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DETERMINING THE SCOPE OF PUBLIC SECTOR COLLECTIVE BARGAINING: A NEW LOOK VIA A BALANCING FORMULA

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I. INTRODUCTION

Collective bargaining is truly a part of the American labor fabric. The serious practitioner knows the current parameters and direction of private sector collective bargaining. The same, however, cannot be said of public sector collective bargaining. The National Labor Relations Act (hereafter NLRA),[1] enacted in 1935, provides for private sector collective bargaining. However, public sector employees (that is, employees of the federal, state, and local governments) continue to be specifically exempt from NLRA coverage.[2] Congressional interest in providing state and local government employees with collective bargaining processes similar to that accorded private sector employees has failed to gain sufficient support.[3] As a consequence, state and local employees have had to look to state and local governments for collective bargaining protections, and such legislative recognition is of recent origin.[4]

Unlike the federal scheme, state and local collective bargaining statutes are far from uniform in their provision for collective bargaining rights and duties. The protections afforded and rights and

1. 29 U.S.C. §§ 151-68 (1976).

2. 29 U.S.C. § 152(2) (1976).

3. This legislation is basically of two types. The first merely removes the current public employee exemptions from the Federal act. The second is a comprehensive statute patterned after the Federal act. Even if Congress considered enacting such legislation, its constitutionality has been recently brought into question by National League of Cities v. Usery, 426 U.S. 833, 852 (1976). Here the court declared that Congress did not have the authority under the Commerce Clause to extend minimum wage and maximum hour provisions of the Fair Labor Standards Act, 29 U.S.C. § 203 (1976), to municipal and state employees. The court held the authority of states to regulate wage hour decisions of its state and local employees was protected under the Tenth Amendment. *See* Sachs, *Federal Regulations of the Public Sector: Implications of National League of Cities v. Usery*, LABOR RELATIONS LAW IN THE PUBLIC SECTOR (ABA Section of Labor Relations Law 1977).

4. Prior to 1959, there were few court decisions and no legislation authorizing public employee collective bargaining. *See* Annot., 31 A.L.R.2d 1142 (1953 and Supp. 1978); Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25, 37 (1974). In 1959, the Wisconsin legislature enacted the first public employee collective bargaining legislation. (WIS. STAT. ANN. §§ 111.70, 111.71 (West 1974)).

duties conferred differ from state to state,[5] and frequently the statutes within a given state provide dissimilar treatment for various classes of public employees.[6] Public sector collective bargaining applicable to state and local public employees is a developing area of law dependent upon diverse state statutes. Consequently, it is difficult to discuss the collective bargaining process applicable to state and local employees except in relation to the legislation of a particular state.

The topic this article presents is the method of determining the appropriate scope of public sector collective bargaining. The suggested approach is based on Montana's situation; however, because of the universal nature of the problem it should be of assistance to other jurisdictions. This discussion is divided into three major categories: general background and legislation (section II); the appropriate scope of public sector bargaining (section III); and application of the developed method (section IV). Section IV applies the developed method to topics arising in contract negotiations between primary and secondary teachers and school boards. While the method can be applied to all public employment categories, primary and secondary education was chosen because it is the employment area that is subject to the most litigation and turmoil. It thus should define most effectively the appropriate scope of collective bargaining,[7] and definitive assistance in this area is imperative.

II. General Background and Legislation

The vast majority of states have enacted some form of public employee collective bargaining legislation.[8] Most often this legislation, like its private sector counterpart, requires the public employer to negotiate with the employee bargaining representative on certain subjects.[9] However, unlike private sector collective bargain-

5. B. Werne, Public Employee Labor Relations [hereinafter cited as Werne] 135-43 (1974).

6. The various classes of public employees (such as police, firefighters, and teachers) may be afforded different collective bargaining rights under the law. *See* Werne, *supra* note 5, at 135-41. *See also* West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 578-79, 295 A.2d 526, 533-34 (1972), where the court notes that the obligation for public employers to bargain with teachers and municipal employees is different.

7. *See generally* Annot., 84 A.L.R.3d 243 (1978). (Note the number of cases that involve public schools.) *See also* Comment, *State Court Interpretation of Teacher Collective Bargaining: Four Approaches to the Scope of Bargaining Issues*, 2 Indus. Rel. L.J. 421 (1977) [hereinafter cited as *Four Approaches*]; note 144, *infra*.

8. Werne, *supra* note 5, at 136.

9. State acts can be divided into two categories—those that require the parties to merely "meet and confer," and those that require "negotiations." Under the "meet and confer" approach the outcome of public employee-employer discussions depends more on management's determinations than on bilateral decisions by equals. Statutes that embody

ing, there is significant uncertainty regarding the scope of these required subjects. Because public sector collective bargaining is relatively new, has few judicial guidelines, and negotiating parties are often inexperienced, a great deal of collective bargaining time is devoted to determining which topics are open to negotiation. Public sector collective bargaining often becomes bogged down, not on the substantive problem of determining what provisions are to be included in any agreement, but on the procedural problem of determining which potential bargaining topics are subject to required negotiation. The inability of the parties to determine whether a certain employee bargaining proposal is subject to mandatory negotiation often results in the breakdown of the bargaining process.

The collapse of the bargaining process sets the stage for the use of employee economic weapons, such as strikes, slow downs, and sick outs. Unlike the situation in most states,[10] public employee strikes are not unlawful in Montana.[11] Whether legal or illegal, public employees' use of economic weapons is widespread, and where vital public services are affected, these activities have a crippling effect. The purpose of public employee collective bargaining is to avoid this strife by providing a method for the employer and the employees constructively to work out their differences.[12] Where the collective bargaining process breaks down because the parties are unable to define which topics are subject to negotiation, the fault for the breakdown lies with the process, and not necessarily with the parties.

Unlike the situation in the private sector, the courts have had difficulty in defining the appropriate scope of public sector collective bargaining. This difficulty is evidenced by the number of practitioners and scholars who have directed their energies toward this subject, the struggle the courts have had with developing an appropriate definition, and the divergence of opinions both groups have reached.[13] An appreciation of the problem and any analysis of the

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that "negotiations" approach tend to treat both parties at the bargaining table as equals and comtemplate that decisions on contract terms will be bilateral. SHAW, THE DEVELOPMENT OF STATE AND FEDERAL LAWS IN PUBLIC WORKERS AND PUBLIC UNIONS 23-25 (1972). This article will be concerned only with legislation that requires "negotiations."

10. WERNE, *supra* note 5, at 186-90.

11. State Dept. of Highways v. Public Employees Craft Council, 165 Mont. 349, 354, 529 P.2d 785, 787-88 (1974).

12. The Montana Act for collective bargaining for public employees provides: "to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the State of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees." MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 39-31-101 (1978) (formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 59-1601 (Supp. 1977)).

13. A discussion of the scope of public sector collective bargaining may be found in the

situation in Montana must begin with the appropriate Montana legislative provisions.

A. *Background of Public Sector Collective Bargaining Legislation in Montana*

The Montana public employees collective bargaining act[14] (hereafter Montana Act) applies to all Montana state and local nonmanagement public employees, except registered nurses in public health care facilities, and professional engineers and engineers in training.[15]

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following articles: Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations,* 30 MD. L. REV. 179 (1970); Moskow, *The Scope of Collective Bargaining in Higher Education,* 1971 WIS. L. REV. 33; Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation,* 38 U. CHI. L. REV. 826 (1971); Blair, *State Legislative Control Over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees,* 26 VAND. L. REV. 1 (1973); Edwards, *The Emerging Duty To Bargain in the Public Sector,* 71 MICH. L. REV. 885 (1973); Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L.J. 1156 (1974); Comment, *Collective Bargaining in the Federal Service: The Permissible Scope of Negotiations under Executive Order 11491,* 25 CASE W. RES. L. REV. 193 (1974); Comment, *Defining the Scope of Grievance Arbitration in Public Education Employment Contracts,* 41 U. CHI. L. REV. 814 (1974); Comment, *Determining the Scope of Bargaining under the Indiana Education Employment Relations Act,* 49 IND. L.J. 460 (1974); Comment, *Public Sector Grievance Procedure, Due Process and the Duty of Fair Representation,* 89 HARV. L. REV. 752 (1976); R. T. Clark, *The Scope of the Duty to Bargain in Public Employment,* LABOR RELATIONS LAW IN THE PUBLIC SECTOR (ABA Section of Labor Relations Law 1977) [hereinafter cited as Clark]; Alleyne, *Statutory Restraints on the Bargaining Obligation in Public Employment,* LABOR RELATIONS IN THE PUBLIC SECTOR (ABA Section of Labor Relations Law 1977) [hereinafter cited as Alleyne]; Wollett, *Collective Bargaining in the Public Sector—A Spherical Perspective,* Report of Seminar on Public Employee Labor Relations (Univ. of Kentucky College of Law 1977); Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience,* 1977 WIS. L. REV. 685 (1977) [hereinafter cited as Weisberger]; *Four Approaches, supra* note 7; Comment, *The Scope of Negotiations under the Iowa Public Employment Relations Act,* 63 IOWA L. REV. 649 (1978). Sackman, *Redefining the Scope of Bargaining in Public Employment,* 19 BOSTON C. L. REV. 155 (1978) [hereinafter cited as Sackman].

14. MCA §§ 39-32-101 to 111 (1978) (formerly codified at R.C.M. 1947, §§ 41-2201 to 2209 (Supp. 1977)). In 1968, the Montana Legislature enacted the Nurses' Employment Practices Act (MCA §§ 39-32-101 to 111 (1978) (formerly codified at R.C.M. 1947, §§ 41-2201 to 2209 (Supp. 1977))), which provided collective bargaining for registered and licensed practical nurses in all health care facilities, whether publicly or privately owned. MCA § 39-32-102 (1978) (formerly codified at R.C.M. 1947, §§ 41-2202 (1), (2), (3), and (5) (Supp. 1977)). In 1971, the Montana legislature enacted the Professional Negotiation Act for teachers, which required school boards to "bargain" on certain subjects and "meet and confer" on other subjects. R.C.M. 1947, §§ 75-6115 to 6128 (repealed 1975). Finally, in 1973, the legislature adopted the act for public employee collective bargaining, the first comprehensive collective bargaining legislation. MCA §§ 39-31-101 to 409 (1978) (formerly codified at R.C.M. 1947, §§ 59-1601 to 1617 (Supp. 1977)). Originally, the statute applied to non-management employees of the state and any political subdivision, except teachers and nurses who continue to be covered under separate legislation. In 1975, the Montana legislature repealed the separate legislation for teachers and brought them within the comprehensive act. Ch. 117, Laws of Montana (1975).

15. MCA §§ 39-31-101 to 409 (1978) (formerly codified at R.C.M. 1947, § 59-1602(2)

The Montana Act is patterned after the NLRA. In addition to providing collective bargaining, it grants other employee protections.[16] The Act is administered by a five-member Board of Personnel Appeals,[17] which in most respects corresponds to the National Labor Relations Board.[18]

B. *The Montana Act Provisions on the Scope of Collective Bargaining*

Under the Montana Act, public employees have the right to "bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment . . . ."[19] The public employer and the employee bargaining representative are required to "meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment,. . . and the execution of a written contract incorporating any agreement reached."[20] However, the obligation to bargain in good faith does not compel either party to agree or make concessions.[21]

In this respect, the Montana Act conforms to the bargaining obligations set forth in the NLRA and most other state public employee bargaining statutes.[22] Under the NLRA, the parties are required to bargain in good faith on "wages, hours, and terms and other conditions of employment . . . ."[23] Unlike the Montana Act, the NLRA does not specifically require good faith bargaining on "fringe benefits," but the federal act has been long construed to include fringe benefits within wages, hours, and other conditions of employment.[24] While the collective bargaining legislation in some

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(Supp. 1977)).

16. For a more complete discussion of the Montana act, see Loring, *Labor Relations Law in Montana,* 39 MONT. L. REV. 33 (1978) [hereinafter cited as Loring]; Comment, *Negotiating with the Public: Montana's Public Employee Collective Bargaining Act,* 36 MONT. L. REV. 80 (1975).

17. MCA §§ 39-31-202, 207, 208, 209, 210, and 403-09 (1978) (formerly codified at R.C.M. 1947, §§ 59-1606 to 1608 (Supp. 1977)).

18. *Compare* MCA §§ 39-31-202, 207, 208, 209, 210 and 403-09 (1978) (formerly codified at R.C.M. 1947, §§ 59-1606 to 1608 (Supp. 1977)) *with* National Labor Relations Act [hereinafter cited as NLRA] §§ 9-10, 29 U.S.C. §§ 160-61 (1976).

19. MCA § 39-31-305(2) (1978) (formerly codified at R.C.M. 1947, § 59-1605(3) (Supp. 1977)).

20. *Id.*

21. *Id.*

22. *Compare* MCA § 39-31-305(2) (1978) (formerly codified at R.C.M. 1947, § 59-1605(3) (Supp. 1977)) *with* 29 U.S.C. § 138(d) (1976).

23. 29 U.S.C. § 158(d) (1976).

24. *See* C. J. MORRIS, DEVELOPING LABOR LAW: THE BOND, THE COURTS AND THE NATIONAL LABOR RELATIONS ACT [hereinafter cited as DEV. LAB. LAW 387-406 (1971); R. GORMAN, LABOR LAW [hereinafted cited as GORMAN] 498-506 (1976).

states may not require bargaining on the four categories set forth in the Montana Act (wages, hours, fringe benefits, and other conditions of employment), the bargaining obligation is frequently so defined.[25]

Unlike the NLRA and most state public employee acts, the Montana Act specifically provides that the public employer's bargaining obligation is narrowed by the fact that the bargaining representative of the public employee shall recognize the "prerogatives of public employers to operate and manage their affairs in such areas as, *but not limited to:*

(1) direct employees;
(2) hire, promote, transfer, assign, and retain employees;
(3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive;
(4) maintain the efficiency of government operation;
(5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;
. . . .
(7) establish the methods and processes by which work is to be performed.[26]

C. *Interpretation of the Montana Act*

When legislation has been patterned after federal private sector legislation, state Public Employee Relations Boards (hereafter PERBs) and courts frequently look to the construction of the federal act for guidance in the interpretation of their state act.[27]

Under the NLRA, the initial step in any discussion on the scope of collective bargaining is to recognize that any given bargaining topic will ultimately be categorized as mandatory, permissive, or illegal and prohibited. Although the federal act does not specifically recognize this trichotomy, the National Labor Relations Board, with judicial approval, has long done so.[28] As a result, every topic of bargaining in the private sector is either a subject on which bargaining is mandatory, permissive, or illegal and thus prohibited. Mandatory subjects are those which either party must negotiate in good

25. WERNE, *supra* note 5, at 247. *See* State of New Jersey v. Supervisory Employees Ass'n, ___ N.J. ___, ___, 393 A.2d 233, 246-47 (1978), where the court notes that fringe benefits is a mandatory subject.

26. MCA § 39-31-303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(2) (Supp. 1977)) (emphasis added).

27. *See, e.g.,* Detroit Police Officers Ass'n v. Detroit, 61 Mich. App. 487, 490, 233 N.W.2d 49, 51 (1975). *See* note 41, *infra.*

28. *See* NLRB v. Wooster Div., Borg-Warner Corp., 356 U.S. 342 (1958).

faith to impasse[29] upon the demand of the other. Permissive subjects are those on which the parties may bargain, but neither party is required to do so. The parties are precluded from bargaining on any illegal topic, and any agreement reached on such a topic is void.[30]

Failure to bargain on a mandatory subject upon the demand of the other is an unfair labor practice and will result in a bargaining order. Either party may insist to impasse on any mandatory subject and any unilateral action taken by the employer prior to a bargaining impasse may result in an order requiring the employer to discontinue the unilateral activity and restore the *status quo*. Because neither party is compelled to bargain on a permissive subject, insistence to impasse on those subjects is an unfair labor practice. However, an agreement reached on a permissive subject is valid and enforceable.[31]

When the state legislature has adopted bargaining duty language similar to that of the NLRA, and state PERBs and courts are required to determine whether a specific bargaining subject is within the legislated scope of negotiations, they often follow the federal lead and adopt the mandatory-permissive-prohibited trichotomy.[32] The Montana Board of Personnel Appeals has done so.[33] This approach is appropriate where the state-legislated bargaining duty is identical or closely similar to the federal act, and the trichotomy conforms to the unique characteristics of public sector collective bargaining. However, where the state legislature has adopted bargaining duty language different from the NLRA and the trichotomy does not conform to public sector collective bargaining, it has been recognized that even this initial step in defining the scope of public sector negotiations should not follow the federal standard.[34] Assuming for the moment that the trichotomy is appropriate under the Montana Act, the critical question is what criteria the Board of Personnel Appeals and the courts should apply to determine whether a topic is mandatory, permissive, or prohibited. The federal method provides the necessary background for consideration of this subject.

The NLRA requires the employer to bargain with the employee

29. Impasse refers to the inability of the parties to agree on a particular topic of bargaining.

30. *See* GORMAN, *supra* note 24, at 496-98; DEV. LAB. LAW, *supra* note 24, at 382-88.

31. *See* DEV. LAB. LAW, *supra* note 24, at 382-88; GORMAN, *supra* note 24, at 496-98.

32. *See, e.g.*, Springfield Educ. Ass'n v. Springfield School Dist. No. 19, ___ Or. App. ___, ___, 547 P.2d 647, 648-49 (1976); Beloit Educ. Ass'n v. Wisconsin Employment Rel. Comm., 73 Wis. 2d 43, 242 N.W.2d 231 (1976).

33. *See, e.g.*, Florence-Carlton Unit of Montana Education Ass'n v. Florence-Carlton School Dist., B.P.A. U.L.P. no. 5-77 (1978).

34. *See* section III(C)(1), *infra*.

bargaining representative on "wages, hours, and other conditions of employment." Bargaining topics categorized as wages, hours, or other conditions of employment are mandatory subjects of bargaining. Prohibited topics of bargaining involve subjects which are illegal under the NLRA, inconsistent with the policies of the act, or violate some other provision of law. In most instances the prohibited topics represent a narrow category of subjects in which neither party has significant interest. Thus, as a practical matter, most nonmandatory topics of bargaining are permissive. Consequently, the issue is whether a given topic is mandatory or permissive. This has not presented a significant problem under the federal act, because mandatory subjects of bargaining have been broadly defined.[35]

The mandatory subject categories of "wages" and "hours" have been broadly defined under the federal act. "Wages" has been construed to include almost every conceivable bargaining issue that concerns rates of pay and fringe benefits such as bonuses, pensions, wage increases, and profit sharing.[36] "Hours" has been given an equally broad construction to include the particular hours of the day and the days of the week that employees are required to work.[37] Thus, with the exception of retired employees, defining "wages" and "hours" has provided few problems. Difficulty has been encountered in determining the limits of "other terms and conditions of employment." It has been recognized that the topic must relate to some aspect of the relationship between the employer and the employees,[38] but not concern "managerial decisions which lie at the core of entrepreneurial control."[39] It is also recognized that fre-

35. DEV. LAB. LAW, *supra* note 24, at 389-439; GORMAN, *supra* note 24, at 496-531.

36. DEV. LAB. LAW, *supra* note 24, at 390-403; GORMAN, *supra* note 24, at 498-502.

37. DEV. LAB. LAW, *supra* note 24, at 403-04; GORMAN, *supra* note 24, at 502-06.

38. *See, e.g.*, NLRB v. Wooster Division, Borg-Warner Corp., 356 U.S. 342, 350 (1958), where the Court indicated that bargaining topics that regulate the relationship between the employee and the union are not mandatory. In this instance the topic would have required the union to submit the employer's last offer to the employees. The Court recognized that mandatory bargaining was limited to proposals that regulate the relationship between the employer and the employees.

It has also been recognized that many topics that primarily concern the relationship between the employer and the union are mandatory subjects of bargaining. *See, e.g.*, United States Pipe & Foundry Co. v. NLRB, 298 F.2d 873 (5th Cir. 1962) (duration of contract); NLRB v. Proof Co., 242 F.2d 560 (7th Cir. 1957) (union's right to use company bulletin boards); NLRB v. Andrew Jergens Co., 175 F.2d 130 (9th Cir. 1949) (union security provisions); Dolly Madison Industries, 182 N.L.R.B. 1037, 74 L.R.R.M. 1230 (1970) (most favored nation clause); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953) (dues checkoff). *See also* NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), *vacated* 379 U.S. 644 (1965), and NLRB v. Royal Plating & Polishing Co., Inc., 350 F.2d 191 (3rd Cir. 1965).

More recently the Board has adopted this position. Westinghouse Elec. Corp., 150 N.L.R.B. 1574, 59 L.R.R.M. 1355 (1965); U.A.W. Local 864 v. NLRB, 470 F.2d 422 (D.C. Cir. 1972); Summit Tooling Co., 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972).

39. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (Stewart, J., con-

quently a topic will concern both legitimate employee interests and managerial decisions. In such a situation the topic is non-mandatory only if it concerns a fundamental managerial decision. The determination of fundamental managerial decisions has caused the courts and the Board difficulty.[40]

Because the bargaining language of public employee collective bargaining legislation closely parallels that of the NLRA, PERBs and state courts frequently look at the federal act to see how similar problems have been resolved in the private sector.[41] However, because of the unique characteristics of public sector collective bargaining, blind reliance on the federal act for guidance in determining the scope of public sector collective bargaining is inappropriate. Any determination of the appropriate scope of collective bargaining in the public sector must recognize the fundamental difference between the private and public sectors and the impact collective bargaining has on the respective decision-making processes. Before discussing this crucial topic, it is important to establish certain funda-

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curring). The Court held that an employer proposal to contract out work previously performed by company employees was a mandatory subject of bargaining. Justice Stewart stated in a concurring opinion:

> While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining . . . .
>
> . . . [T]here are . . . areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment . . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id. at 223. The court later referred to the Stewart opinion with approval in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

40. *Id.*

41. In Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 617, 526 P.2d 971, 977 116 Cal. Rptr. 507, 513 (1974), the California Supreme Court held "that the bargaining requirements of the National Labor Relations Board in cases interpreting the many proposals be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter." The court then determined that a series of proposals were mandatory, relying almost entirely on NLRB precedent.

In Kerrigan v. City of Boston, 36 Mass. 24, 27, 278 N.E.2d 387, 390 (1972) the Massachusetts Supreme Judicial Court stated the scope of bargaining the under the Massachusetts act must be given the "adjudged construction" given under the federal act. Similarly, the Michigan court observed there is "no reason to deviate from this well-reasoned and long established federal precedent in interpreting [the Michigan Act]." Detroit Police Officers Ass'n v. City of Detroit, 391 Mich. 44, 63-64, 214 N.W.2d 803, 813.(1974).

mentals necessary in the development of the appropriate scope of public sector bargaining.

III. Development of the Appropriate Scope of Public Sector Bargaining

Statutory authority for defining the scope of collective bargaining in the public sector arises in two ways. In states that have borrowed language from the federal act and require bargaining on subject matter areas similar to "wages, hours, and other conditions of employment," the determination of the scope of bargaining depends, as under the federal act, primarily upon the construction of the terms "wages," "hours," and "other conditions of employment." Like the federal act, there is no specific mention of employer prerogatives, which thus must be implied.[42] In accordance with the construction of the federal act, PERBs and courts in these states recognize that if a subject represents an employer prerogative it is non-mandatory.[43]

Other state legislatures have further defined the scope of collective bargaining. These states, in addition to establishing a statutory duty section requiring negotiation on "wages, hours, and other conditions of employment,"[44] have adopted statutory employer rights

42. *See, e.g.*, MICH. STAT. ANN. § 17.455(15) (1975).

43. *See, e.g.*, West Hartford Educ. Ass'n v. Decourcy, 162 Conn. 566, 580, 295 A.2d 526, 533-34 (1972).

44. Not all states use the phrase "wages, hours, and other conditions of employment." In the Connecticut Teachers Negotiation Act, the legislature required bargaining on only "salaries and other conditions of employment." CONN. GEN. STAT. § 10-1536(c) (1979). NEV. REV. STAT. § 288.150(2) (1970) limits mandatory bargaining to:

(a) Salary or wage rates or other forms of direct monetary compensation.
(b) Sick leave.
(c) Vacation leave.
(d) Holidays.
(e) Other paid or unpaid leaves of absence.
(f) Insurance benefits.
(g) Total hours of work required of an employee on each work day or work week.
(h) Total number of days' work required of an employee in a work year.
(i) Discharge and disciplinary procedures.
(j) Recognition clause.
(k) The method used to classify employees in the bargaining unit.
(l) Deduction of dues for the recognized employee organization.
(m) Protection of employees in the bargaining unit from discrimination because of participation in recognized employee orgainizations consistent with the provisions of this chapter.
(n) No-strike provisions consistent with the provisions of this chapter.
(o) Grievance and arbitration procedures for resolution of diputes relating to interpretation or application of collective agreements.
(p) General savings clauses.
(q) Duration of collective bargaining agreements.
(r) Safety.

provisions which recognize certain non-mandatory employer prerogatives. Statutory recognition of employer prerogatives is often the single most important distinction between public and private sector collective bargaining legislation. In some states the legislation merely recognizes the area of employer prerogatives,[45] whereas in other states the legislation identifies specific subjects which are employer prerogatives.[46] Some states go even further and indicate that employer prerogatives are not limited to those specified.[47] The Montana Act is in this last category.[48] It provides that bargaining must occur on "wages, hours, fringe benefits and other conditions of employment," but recognizes the prerogative of the employer on certain specified topics and indicates the prerogatives are not limited to the topics specified.[49]

Whether the concept of management prerogatives is an implicit limitation on "wages, hours, fringe benefits and other conditions of employment," or specifically recognized by statute and broadly defined, state PERBs and courts share a common problem in reconciling the mandatory duty to bargain on "wages, hours, fringe benefits and other conditions of employment" with non-mandatory management prerogatives. It is universally recognized that there is an illu-

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(s) Teacher preparation time.

(t) Procedures for reduction in work force.

45. *See, e.g.*, West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 573-74, 295 A.2d 526, 531 (1972); School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972).

46. NEV. REV. STAT. § 288.150(3) (1975) provides an extensive list of employer prerogatives:

> Those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include:
>
> (a) The right to hire, direct, assign, or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline.
>
> (b) The right to reduce in force or lay off any employee because of lack of work or lack of funds, subject to paragraph (t) of subsection 2.
>
> (c) The right to determine:
>
> (1) Appropriate staffing levels and work performance standards except for safety considerations;
>
> (2) The content of the workday, including without limitation workload factors, except for safety considerations;
>
> (3) The quality and quantity of services to be offered to the public; and
>
> (4) The means and methods of offering those services.

47. For example, the Pennsylvania Public Employee Relations Act provides that "[p]ublic employers shall not be required to bargain over matters of inherent managerial policy which shall include, *but shall not be limited to* such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." (Emphasis added.) PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1978).

48. *See* section II(B), *supra*.

49. MCA §§ 39-31-201 and 303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(1) and (2) (Supp. 1977)).

sive line between mandatory subjects of bargaining and non-mandatory employer rights,[50] with the employees seeking a broad interpretation of mandatory subjects and the employer seeking a narrow construction. PERBs and courts generally recognize that a bargaining topic may touch upon both "wages, hours, fringe benefits and other conditions of employment" *and* "employer prerogatives."[51] However, because a topic cannot be both mandatory and non-mandatory, this potential conflict must be resolved. It has been extremely difficult for both PERBs and courts to draw an acceptable line between these two categories.

An overly broad construction of the mandatory subjects adversely affects the public enterprise, and an overly broad construction of employer prerogatives cirtually cancels the bargaining obligation. It would be extremely easy for "wages, hours, fringe benefits, and other conditions of employment" virtually to swallow management prerogatives, or vice versa.[52] To ensure the stability and vitality of both the collective bargaining process and the public enterprise, a fair and accurate method must be devised to distinguish between "wages, hours, fringe benefits, and other conditions of employment" and "employer prerogatives." Before attempting

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50. *See, e.g.,* Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 25, 311 A.2d 737, 741 (1973). The Oregon court recognized that "nearly everything that goes on in the schools affects teachers and [is] therefore arguably a 'condition of employment,'" and "many of the matters which have a substantial effect on teachers contain a measure of educational policy." Springfield Educ. Ass'n v. Springfield School Dist. No. 19, ___ Or. Ap. ___, ___, 547 P.2d 647, 650 (1976). As one Maine judge noted, "Educational policies" and "working conditions" may be reasonably conceived as categories defining areas with essential purity at the extremities but with intermediate zones of substantial intermixture. Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 304 A.2d 387, 413 (Me. 1973) (dissenting opinion). *See also* West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 534 (1972) ("Many educational policy decisions make an impact on a teacher's conditions of employment and the reverse is equally true. There is no unwaivering line separating the two categories.") and Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 615, 526 P.2d 971, 976, 116 Cal. Rptr. 507, 512 (1974).

51. Red Bank Bd. of Educ. v. Washington, 138 N.J. Super. 564, 573, 351 A.2d 778, 783 (1976) (*citing* Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973)); Pa. Labor Rel. Bd. v. Mars Area School Dist., ___ Pa. ___, ___, 389 A.2d 1073, 1075 (1978) (*citing* Pa. Labor Rel. Bd. v. State College Area School Dist. 461 Pa. 494, 507, 337 A.2d 262, 268 (1975)).

52. Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 615, 526 P.2d 971, 976, 116 Cal. Rptr. 507, 512 (1974). *See* Pa. Labor Rel. Bd. V. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 267 (1975). As one author has noted:

> A problem with both management rights and statutory preemption provisions is that both are susceptible of (1) a literal interpretation that virtually cancels out the bargaining-obligation language "wages, hours, terms and conditions of employment"; (2) a nonliteral interpretation that reconciles the apparent conflict with bargaining-obligation language by giving the management rights and statutory preemption provisions an interpretation that virtually repeals them. It seems impossible to find a middle ground.

Alleyne, *supra* note 13, at 106.

to draw the line between these two general subject categories, each must be defined.

A. *Mandatory Subjects of Bargaining*

The mandatory subjects are "wages, hours, and other conditions of employment" or some similar grouping of subjects.[53] The Montana Act adds "fringe benefits" to the list. Of these four categories, "wages," "hours," and "fringe benefits" have given the courts little difficulty.[54]

1. *Wages, Hours, and Fringe Benefits*

The term "wages" has been broadly defined to include almost any conceivable method of compensation for direct wages, salaries,[55] overtime, and extra duty pay,[56] to the more indirect methods of compensation including vacation and holiday pay,[57] retroactive pay,[58] longevity increments,[59] and severance pay.[60] While the term "hours" has caused more difficulty, it is recognized that public employees are entitled to bargain over the amount of time they are required to work,[61] over their workload,[62] and conversely, over the frequency and amount of work not required.[63] The scheduling of employee work time has received varying treatment.[64]

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53. *But see* note 44, *supra.*

54. *See* West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 577-79, 295 A.2d 526, 533-34 (1972).

55. *See generally* State College Educ. Ass'n v. Pa. Labor Rel. Bd., 9 Pa. Commw. Ct. 229, 306 A.2d 404 (1973), *rev'd on other grounds,* 461 Pa. 494, 337 A.2d 262 (1975).

56. York v. Reihart, 27 Pa. Commw. Ct. 36, 365 A.2d 693 (1976); Bridgeton Education Ass'n v. Bd. of Educ., 132 N.J. Super. 554, 334 A.2d 376 (1975).

57. Taureck v. Jersey City, 149 N.J. Super. 503, 374 A.2d 70 (1977).

58. *Id;* San Joaquin County Employee Ass'n v. San Joaquin, 44 Cal. App. 3d 232, 118 Cal. Rptr. 662 (1972).

59. Taureck v. Jersey City, 149 N.J. Super. 503, 374 A.2d 70 (1977); North Kingstown v. North Kingstown Teachers Ass'n, 110 R.I. 698, 297 A.2d 342 (1972).

60. There has been considerable difficulty with provisions seeking wage parity between various employee groups. New York in Voight v. Bowen, 53 A.D.2d 277, 385 N.Y.S.2d 600 (1976), and Connecticut in Int'l Ass'n of Fire Fighters Local 1219 v. Conn. Labor Rel. Bd., 171 Conn. 342, 370 A.2d 952 (1976), have held these provisions invalid.

61. N.Y. City School Bds. Ass'n v. Bd. of Educ., 39 N.Y.2d 111, 347 N.E.2d 568, 383 N.Y.S.2d 208 (1976).

62. Red Bank Bd. of Educ. v. Washington, 138 N.J. Super. 564, 351 A.2d 778 (1976); Dublin Professional Fire Fighters v. Valley Community Service Dist., 45 Cal. App. 3d 116, 119 Cal. Rptr. 182 (1975); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972).

63. Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215, *aff'd,* 38 N.Y.2d 778, 354 N.E.2d 338, 381 N.Y.S.2d 866 (1973).

64. *Compare* School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972) (scheduling of work is an employer prerogative) *with* Local 189, Amalgamated Meatcutters v. Jewel Tea Co., 381 U.S. 676 (1965). *See also* Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973).

Fringe benefits are widely recognized in both the private and public sector to constitute nothing more than indirect wages, reduced hours, or a combination of both.[65] Fringe benefits on which bargaining is commonly required include indirect wage benefits (such as health insurance,[66] pensions and retirement provisions,[67] and dental services[68]) and reduced hours (sick leave,[69] vacation leave,[70] and other paid time off[71]). Insofar as the category represents indirect wages and hour topics, they are mandatory subjects under the categories of "wages" and "hours."

Bargaining subjects that come within the categories "wages, hours, and fringe benefits" usually do not conflict with employer prerogatives because these subjects are economic, while employer prerogatives generally concern non-economic issues.[72] Consequently, if bargaining is limited to economic issues, conflict with employer prerogatives generally does not occur.

When bargaining changes from the economic issues of wages, hours, and fringe benefits to the category "other conditions of employment" there is great potential for conflict. This occurs because while "other conditions of employment" may refer to economic issues not fully covered by "wages, hours, and fringe benefits," employee bargaining representatives frequently rely on the term for the introduction of non-economic policy subjects at the bargaining table.

A great many non-economic topics find their way to the bar-

65. The court in J.H. Welch & Son Contracting Co. v. Arizona State Tax Comm'n, 4 Ariz. App. 398, 420 P.2d 970 (1966), *aff'd,* 102 Ariz. 443, 432 P.2d 455 (1967), defined fringe benefits as payments made to another for the employee's benefit, as opposed to the wage payments made directly to the employee. *See also* N.J. v. Supervisory Employees Ass'n, ___ N.J. ___, ___, 393 A.2d 233, 239 (1978) (fringe benefits are "essential components of terms and conditions of employment").

66. Brooks v. School Comm. of Floucester, ___ Mass. ___, 360 N.E.2d 647 (1977).

67. Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215, *aff'd,* 38 N.Y.2d 778, 354 N.E.2d 338, 381 N.Y.S.2d 866 (1973).

68. New Jersey Civil Serv. Ass'n v. Camden, 135 N.J. Super. 308, 343 A.2d 134 (1975).

69. Syracuse Teachers Ass'n v. Bd. of Educ., 42 App. Div. 2d 73, 345 N.Y.S.2d 239, *aff'd,* 35 N.Y.2d 743, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1973).

70. South Orange—Maplewood Ed. Ass'n v. Bd. of Educ., 146 N.J. Super. 457, 370 A.2d 47 (1977).

71. Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215, *aff'd,* 38 N.Y.2d 778, 354 N.E.2d 338, 381 N.Y.S.2d 866 (1975) (paid time for union activity).

72. This is true whether the statute recognizes certain employer prerogatives or whether such prerogatives are implicit. For example, the Montana provision concerning employer prerogatives contains no economic issues. *See* section II(B), *supra. See also* the extensive list of employer prerogatives recognized in Nevada, *supra* note 46. Similarly, the Nebraska Act, which makes no specific provision for employer prerogatives, has been interpreted to exclude certain non-economic issues from mandatory negotiation. School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972). *See also* Chappell v. Comm'r of Educ., 135 N.J. Super. 565, 343 A.2d 811 (1975); Skaneateka Teachers Ass'n v. New York State Public Employment Rel. Bd., 88 Misc. 2d 816, 389 N.Y.S.2d 257 (1976).

gaining table as "other conditions of employment." Topics like notice of competitive examinations for employee positions,[73] penalties for tardiness,[74] residency requirements,[75] transfers,[76] probationary periods,[77] evaluations,[78] staff reductions,[79] discharges,[80] and special assistance to employees having work difficulties[81] are all arguably conditions of employement, yet all arguably interfere with the prerogatives of management.

2. *Other Conditions of Employment*

PERBs and state courts have broadly defined "other conditions of employment" to include those subjects, other than "wages, hours and fringe benefits," in which employees have a legitimate employment interest. While the exact language of the "test" has differed somewhat from state to state, non-economic subjects about which employees have a legitimate employment interest are generally initially considered as conditions of employment.[82] An initial determination that a topic concerns a legitimate employment interest does not ensure that the topic is mandatory. A topic may involve a legiti-

73. Fire Fighters Union v. Pleasanton, 56 Cal. App. 3d 959, 129 Cal. Rptr. 68 (1976) (held mandatory).

74. Albany v. Helsby, 48 App. Div. 2d 998, 370 N.Y.S.2d 215, *aff'd*, 38 N.Y.2d 778, 354 N.E.2d 338, 381 N.Y.S.2d 866 (1975) (held mandatory).

75. Detroit Police Officers Ass'n v. Detroit, 391 Mich. 44, 214 N.W.2d 803 (1974) (held mandatory).

76. Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 612 P.2d 426 (1973) (held mandatory).

77. *Id.*

78. *Id;* City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) (held mandatory).

79. Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers Ass'n, 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975) (held non-mandatory).

80. Central Point School Dist. v. Employment Rel. Bd., 27 Or. App. 285, 555 P.2d 1269 (1976) (held non-mandatory).

81. City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1976) (held non-mandatory).

82. In West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 534 (1972), the court discussed the importance of the "impact" of educational policy decision on teachers' conditions of employment. *Accord,* Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975). The Wisconsin court used the term "primarily related." City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 54, 242 N.W.2d 231, 236 (1976). The Nebraska court uses the phrase "matters directly affecting the teacher's welfare." School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972). *Accord,* Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 512 P. 2d 426 (1973). Bd. of Educ. v. Englewood Teachers Ass'n, 64 N.J. 1, 311 A.2d 729 (1973); Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 548 P.2d 204 (1976) (effect that the subject has on a teachers employment). The South Dakota court uses the term "materially affect." Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 133, 215 N.W.2d 837, 841 (1974). If the subject has a "remote and incidental effect on the terms and conditions of employment," the topic is non-mandatory. Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 24, 311 A.2d 737, 743 (1973).

mate employment interest as well as a non-mandatory employer prerogative. Because conditions of employment and management prerogatives are mutually exclusive, in the final analysis if the topic is a condition of employment it will not be a management prerogative, and vice versa. In other words, a topic that represents a legitimate employee interest and is initially designated as a condition of employment may lose its status as a condition of employment if the topic is a prerogative of management.[83] A broad definition of "other conditions of employment" which includes all topics in which employees have a legitimate employee interest ensures that legitimate employee bargaining concerns are recognized, and unless the topic also concerns some overriding prerogatives of the employer, it will ultimately be a mandatory bargaining subject. Accordingly, if a topic represents a legitimate employment interest, the determination whether the topic is a mandatory subject of bargaining must wait until the impact on the prerogatives of the employer is determined.

B. *Employer Prerogatives*

As previously noted, state legislative treatment of employer prerogatives varies greatly.[84] Because of this wide variety of legislative treatment, it is impossible to find a universally accepted definition of employer prerogatives. However, two conclusions can be drawn. Clearly the prerogatives of the employer are limited to enterprise policy interests. On the other hand, not all such policy interests are exempt from mandatory negotiation. The problem faced by PERBs and courts is initially finding an acceptable definition of "enterprise policy interest" and then determining whether a particular enterprise policy interest is exempt from mandatory collective bargaining.

As a general rule, enterprise policy interest can be divided into two categories: (1) the formulation of fundamental organization policy, and (2) the determination of the method and means to implement such policy decisions.[85] While these two broad categories generally represent enterprise policy interests, not all potential bargaining topics that affect one or both of these categories are non-mandatory employer prerogatives. The determination of whether a given topic which affects policy formulation or the method and means of policy implementation is in fact non-mandatory will be fully discussed later.[86] At this point, however, it can be said that a

83. *Id.*
84. *See* discussion accompanying notes 42-49, *supra.*
85. *See* section III(C)(4), *infra.*
86. *Id.*

bargaining topic which has an impact upon policy formulation or implementation will be subject to close analysis.

The Montana Act provides that the "prerogatives of public employees" include the operation and management of their affairs in seven broad policy areas, but the employer prerogatives are "not limited to" these specified areas.[87] Most of the specific policy areas concern the method and means of policy implementation rather than policy formulation. Thus, the Montana Act provides that the public employer has exclusive authority to hire, direct,[88] assign, promote, transfer, relieve,[89] and retain employees.[90]

This broad grant of personnel authority primarily concerns the ability of the public manager to maintain control over the manner and means of policy implementation. The authority to hire, fire, promote, transfer, assign, and direct employees is the backbone of policy implementation. Many of these specific provisions may be included in the general statutory management rights provision that says the employer has the right to "determine the methods, means, job classifications, and personnel by which government operations are to be conducted."[91]

The Montana Act also provides that the employer has authority to "maintain the efficiency of government operations"[92] and to "take whatever actions may be necessary to carry out the missions of the agency in situations of emergency."[93] While governmental efficiency certainly is a fundamental policy, authority to "maintain" efficiency appears to denote the method and means of implementation. Similarly, while it could be argued that agency "mission" concerns the formulation of agency policy, actions to "carry out the missions of the agency in situations of emergency" refers to the method and means of implementing the agency mission or policy, not the formulation of such policy. Nevertheless, Mon-

87. MCA § 39-31-303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(2) (Supp. 1977)).

88. In addition to the prerogative to "direct," the Act provides that the employer has the prerogative to "establish the method and process by which work is performed." MCA § 39-31-303(7) (1978) (formerly codified at R.C.M. 1947, § 59-1603(2)(g) (Supp. 1977)).

89. The Act specifies that the employer may "relieve employees from duties because of lack of work or funds or other conditions where continuation of such work would be inefficient and non-productive." MCA § 39-31-303(3) (1978) (formerly codified at R.C.M. 1947, § 59-1603(2)(c) (Supp. 1977)).

90. MCA § 39-31-303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(2) (Supp. 1977)).

91. MCA § 39-31-303(5) (1978) (formerly codified at R.C.M. 1947, § 59-1603(2)(e) (Supp. 1977)).

92. MCA § 39-31-303(4) (1978) (formerly codified at R.C.M. 1947, § 59-1603(2)(d) (Supp. 1977)).

93. MCA § 39-31-303(6) (1978) (formerly codified at R.C.M. 1947, § 59-1603(2)(f) (Supp. 1977)).

tana's statutory management rights clause is replete with specific directives regarding the method or means of implementing public policy.

It could be argued that despite the passing reference to governmental "efficiency," "operations," and "missions," there is no specific delineation of the employer prerogative in policy formulation; while the legislature recognized management prerogatives in method and means of policy implementation, it did not designate policy formulation as a prerogative. While this position may arguably be correct from a perspective of narrow statutory construction, it is without reason or precedent in the law.

Courts have unanimously agreed that while not every issue that can be considered policy formulation is exempt from bargaining, bargaining topics that have an impact on the formulation of policy are a suspect group.[94] Even in those states where the legislatures have failed to address the subject of employer prerogatives, courts have held that employer prerogatives in matters of policy are an implicit limitation on the mandatory subjects of bargaining.[95] Courts agree that non-mandatory subjects of bargaining represent fundamental employer interests and that no employer interest is more fundamental than establishing the primary objectives of the enterprise. The cornerstone of employer prerogatives is the recognition that the public employer must be allowed to establish fundamental policy without being required to negotiate the matter with its employees. While it is arguable that the Montana legislature could have stated this principle more clearly in its broad definition of public employers' prerogatives, there can be no doubt that the formulation of fundamental policy is a management prerogative.[96]

Regardless of what other topics may be recognized as employer prerogatives under the "not limited to" clause, employer prerogatives in Montana represent a relatively broad area of policy formulation and policy implementation topics. The actual parameter of the statutory employer rights clause must be determined on a case-by-

94. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); Nat'l Educ. Ass'n v. Bd. of Educ. 212 Kan. 741, 512 P.2d 426 (1973); School Committee of Hanover v. Curry, 369 Mass. 683, 343 N.E.2d 144 (1976); School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973); Skaneateles Teachers Ass'n v. New York State Public Employment Rel. Bd., 88 Misc. 2d 816, 389 N.Y.S.2d 257 (1976); Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 548 P.2d 204 (1976); Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975); City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1975).

95. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d 737 (1973).

96. *See* text accompanying note 137, *supra.*

case basis.[97] A broad definition of employer rights does not necessarily mean that the scope of mandatory negotiations is proportionately narrowed. As was previously indicated, a broad initial definition of "conditions of employment" is not determinative of whether the subject is mandatory or non-mandatory. Indeed, a broad definition only indicates that the employees have a legitimate interest in the topic. Similarly, a broad definition of employer prerogatives includes a large number of topics in which the public employer has a legitimate interest in exempting from the bargaining process. It is quite likely that a potential topic of bargaining will touch upon both the employee's legitimate interest and public employer's prerogative. State PERBs and courts have long recognized this potential conflict.[98] Many bargaining topics will touch upon both conditions of employment and employer prerogatives and frequently the line separating these two statutory categories is almost indistinguishable. It is therefore better to accept the inevitability of this potential conflict and devise an appropriate method for its resolution, rather than formulate an unrealistically limited definition of employee interests and employer prerogatives which does not fairly consider the respective interests of each.

C. *A Balancing Formula for the Resolution of Conflicting Employee-Employer Interests*

Most courts recognize that a narrow construction of conditions of employment and employer prerogatives does not fairly represent the legitimate interests of either group.[99] It is possible to resolve whether a particular subject is mandatory or non-mandatory and still recognize legitimate employee-employer interests. At first glance, PERBs and courts have resolved this issue without formulating any consistent standards; however, upon close analysis they have most frequently used a balancing formula.[100] A balancing for-

97. As the Pennsylvania court noted, "we also recognize the wisdom of refraining from attempting to fashion broad and general rules that would serve as a panacea. The obviously wiser course is to resolve disputes on a case-by-case basis until we develop, through experience in the area, a sound basis for developing overall principles." Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 265 (1975). City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 242 N.W.2d 231 (1975). *Accord,* Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 512 P.2d 426 (1973).

98. *See* text accompanying notes 50-51, *supra.*

99. *See id.*

100. The test to be applied in determining whether a proposed subject is a "condition of employment" and therefore a mandatory subject of bargaining, as opposed to permissive, is to "balance the element of . . . policy involved against the effect that the subject has no [employees'] employment." Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 584 P.2d 204, 205 (1976). *Accord,* Biddeford Bd. of Educ. v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 311 A.2d

mula allows full recognition of legitimate employee interests in bargaining and the employer's concerns over its inherent prerogatives. If the legitimate interests of the employees in the subject outweighs the employer's concern, the topic is mandatory and the employer is required to bargain in good faith to impasse. If the legitimate concerns of the employer outweigh the legitimate interests of the employees, the subject is non-mandatory.

Stating the balancing formula is much easier than applying it to a specific subject of bargaining. Although balancing competing interests is never an easy task, it is a cornerstone of decision making, and courts and administrative agencies are particularly familiar with the process. Application of the balancing formula has given state PERBs and courts much difficulty, not because they fail to understand how to balance competing interests, but because they are not familiar with the unique characteristics and concerns that underlie public sector collective bargaining. They also often do not understand the applicable competing interests. Failure to correctly perceive the competing interests and the unique framework in which the decision will operate results in decision making which distorts rather than enforces public sector bargaining. One of the most common errors of decision makers is to rely on the resolution of similar issues in the private sector for guidance or precedent in the public sector.

1. *The Inappropriateness of Reliance on Private Sector Decisions*

As noted previously, a large body of law has been developed under the NLRA resolving conflicts between conditions of employment and employer prerogatives. Because this large body of private sector case law exists, some state PERBs and courts have turned to these private sector decisions for assistance in resolving similar pub-

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737 (1973); Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 512 P.2d 426 (1973); Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975). A few courts have relied upon the "significant relations" standard to resolve this overlap problem. Under this test, the subject is mandatory if it is found to be "significantly related to wages, hours, and other conditions of employment even though that item is also related to management prerogative." Clark City School Dist. v. Local Gov't Employees Management Rel. Bd., 90 Nev. 442, 446-447, 530 P.2d 114, 117 (1974). *See also* Los Angeles County Dept. of Public Social Service and Dept. of Personnel, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (1973).

The significant relations test represents a distinct bias towards negotiability because it focuses on only one-half of the overlap problem. Because it considers only the interests of the employees and is blind to the employer concerns, it is not an appropriate method of determining scope of bargaining. *See* Cent. Mich. Univ. Faculty Ass'n v. Cent. Mich. Univ., ___ Mich. ___, ___, 273 N.W.2d 21, 31 (1978) (Coleman, J., dissenting). *See also* Sackman, *Redefining the Scope of Bargaining in Public Employment*, 19 B. C. L. REV. 155, 176-177 (1978); Bd. of Educ. v. Woodstown Educ. Ass'n, ___ N.J. ___, 395 A.2d 884 (1978). The balancing formula avoids this bias by recognizing both employee and employer interests.

lic sector bargaining issues.[101] This reliance is inappropriate because of the fundamental differences between the public and private sector. The differences are particularly relevant in determining the scope of collective bargaining. Frequently, PERBs and courts preface their analysis with the statement that there are obvious differences between the public and private sector. To the extent these differences affect the determination of the proper scope of public sector bargaining, the precedent of the private sector should not be controlling. Once the PERB or court has indicated that a distinction between the public and private sector may preclude the adoption of the private sector rationale in the public sector, the court or PERB then reviews how similar issues have been resolved in the private sector.[102]

This approach is appropriate only if the PERB or court appreciates the distinction between the public and private sectors. Unless the decision maker appreciates the distinction, it is in no position to evaluate the private sector precedent. All too often, the decision maker merely pays lip service to an undefined distinction between the public and private sectors, considers the precedent of the private sector and then decides the weight that is to be accorded the private sector precedent. Because the decision maker fails properly to concern itself with the differences between the private and public sectors, a determination on how similar competing interests were resolved in the private sector does not provide any insight on whether this rationale should be adopted in the public sector. Failure to draw the distinction between private and public collective bargaining results in less-than-accurate decisions and in the long run creates a lack of predictability in decision making. This confusion will be eliminated and predictability will prevail when a definitional framework exists from which to operate.[103]

On occasion, state PERBs and courts have noted that the obvious difference between private and public sector bargaining is the

101. *See* note 27, *supra.*

102. As one court noted, the language establishing mandatory subjects is patterned after the NLRA, and "[f]or this reason the judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own acts." West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 579, 295 A.2d 526, 534 (1972). *See also* Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262 (1975); Int'l Bhd. of Teamsters, Local 320 v. City of Minneapolis, 302 Minn. 410, 225 N.W.2d 254 (1975).

103. As one author indicates, the deicisons do not "reveal much about which factors are considered . . . and are unfortunately conclusory in nature and one is left to guess at the elements which have been subjected to a complex balancing process." Weisberger, *The Appropriate Scope of Bargaining in the Public Sector: The Continuing Controversy and the Wisconsin Experience,* 1977 WIS. L. REV. 685, 735.

government's presence as the employer in the latter situation.[104] The employer's identity is a rudimentary distinction, but absent further articulation, it does not adequately define the proper sphere of public employee collective bargaining or afford an adequate method of comparing it with its private sector counterpart. More attention must be given to this definitional task prior to balancing the competing interests. Without an understanding of these competing interests, a decision affecting these interests will be little more than arbitrary. Not only must the decision maker understand the framework in which the decision will operate, the decision maker must succinctly state that framework. PERBs and courts must establish guidelines to direct the resolution of future controversies in this area of decision making. These guidelines will be critical in avoiding controversies at the bargaining table as they will direct the parties on the appropriate method and considerations to be used in resolving the scope of bargaining controversies. A major goal of collective bargaining is to minimize employee-employer disruptions,[105] yet the failure to provide adequate guidelines for the resolution of scope-of-bargaining problems only increases these disruptions.

2. *The Distinction between Collective Bargaining in the Private and Public Sectors: The Operative Constraints and the Bargaining Process*[106]

Economic considerations are the primary constraints on the scope of collective bargaining in the private sector. Every decision of the private sector employer has economic consequences. While the private sector employer undoubtedly offers some product or service, the continued offering of the product or service is contingent upon a favorable economic position. It is the accountant's bottom line that determines the success or failure of the private sector employer. Like every other private sector decision when reduced to its common denominator, collective bargaining is merely a method to determine the employee's share of the economic pie. All employee demands have an economic impact on the employer. The employer

104. State College Educ. Ass'n v. Pa. Labor Rel. Bd., 9 Pa. Commw. Ct. 229, 236, 306 A.2d 404, 409 (1973); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n. 64 N.J. at 17, 311 A.2d at 740. *See also* West Hartford Educ. Ass'n. v. DeCourcy, 162 Conn. 516, 295 A.2d 526 (1972).

105. "Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . ." NLRA, 29 U.S.C. § 151 (1976). The Montana Act is accord. *See* MCA § 39-31-101 (1978) (formerly codified at R.C.M. 1947, § 59-1601 (Supp. 1977)).

106. *See generally* H. WELLINGTON, R. WINTER, JR., THE UNIONS AND THE CITIES (1971); Summers, *Public Employee Bargaining: A Political Perspective,* 83 YALE L.J. 1156 (1974) [hereinafter cited as Summers].

is aware of this economic impact and is motivated by economic constraints at the bargaining table. It is the actual, perceived, or desired economic position of the private sector employer which "draws the line" during bargaining.

The employer seeks to preserve his control of the enterprise and limit the amount of employee control. At the bargaining table the employer can give only a portion of the economic resources of the enterprise. How much the private employer may be willing to give is based upon his conception of the amount of economic resources that must be retained by the enterprise, such as its position in the industry, its current financial status, and its growth prospectus.

Where economics is the operative constraint on bargaining, the scope of mandatory subjects of bargaining can be broadly defined. The private sector employer is in a position to determine how much of the economic pie to give the employees. If a bargaining subject is mandatory, the employer is required to bargain with the employee representative in good faith; he need not agree or make concessions. Thus the employer is in a position to mold the collective bargaining package, not only as to the *amount* of the economic benefits given, but also to the *type* of benefits given in the form of wages and benefits, hours, and job security. The only non-mandatory topics affecting the employee-employer relationship are within the category of subjects which "lie at the core of the entrepeneurial control,"[107] or those that ultimately concern the direction and control of the enterprise. This category is narrowly defined in the private sector because every private sector bargaining topic will involve economic consequences, and the employer has ample incentive to negotiate the parameters of the employee economic package. Accordingly, mandatory subjects of bargaining are broadly defined in the private sector because from the employer's position the result can be reduced to dollars and cents, a constraint of which the employer is uniquely aware and motivated to limit. Moreover, as one author has noted, in the "[p]rivate sector collective bargaining is the only instrument through which employees have an effective voice in determining terms and conditions of employment." The process is one of industrial democracy, and thus many subjects are open to bargaining.[108]

In contrast to the private sector model, the ultimate employer in the public sector is the public. The public is represented in its "employer capacity" by a public entity (a governor, mayor, county commission, city council, or school board) that operates in the dual

107. *See* text accompanying notes 38 and 39, *supra*.
108. Summers, *supra* note 106, at 1193.

capacity of policy maker and manager. As a public policy maker, the entity must listen, consider, and respond to the conflicting interests of all groups in the community, including the public employees. The determination of public policy is a multilateral process in which all public interest groups participate. The amount of public resources allocated to any one public interest group is determined in a forum in which all groups participate. Thus, in the public sector the operative constraint is politics, not economics.[109]

The public entity in its role as employer-manager and policy maker is charged with the operation of the public facility. The public employer does not enter the bargaining process attempting to protect only an economic interest; rather, he enters in the dual capacity of employer-manager and public policy maker. He looks not only to his accountant during negotiations, but to the larger community. The public employer's strength ultimately is measured on whether it can successfully accommodate the interests of the entire community and not the demands of any one particular group.[110]

A second major distinction between the public and private sector is the effect the introduction of collective bargaining has on the decision making process. Prior to the introduction of collective bargaining in the private sector, the employer controlled the decision making process. The introduction of collective bargaining broadened this unilateral process into a bilateral process in which both the employer and the employees participate.[111]

The introduction of collective bargaining in the public sector had the opposite effect. It narrowed rather than broadened the decision making process. Prior to collective bargaining in the public sector, decision making was a multilateral process.[112] The process

109. The "difference between the public and private bargaining relates to the social costs. The social costs of collective bargaining in the private sector are principally economic and seem inherently limited by market forces. In the public sector, however, the costs [are] economic only in a very narrow sense and are on the whole political. Further, to the extent union power is delineated by market forces in the private sector, these constraints do not come into play nearly as quickly as in the private." H. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1117 (1969) [hereinafter cited as Wellington & Winter]. *See also* Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 U.C.L.A. L. REV. 867, 874 (1974) [hereinafter cited as Shaw & Clark]; D.H. Wollett, *Collective Bargaining in the Public Sector—A Spherical Perspective*, REPORT OF SEMINAR PUBLIC EMPLOYEE LABOR RELATIONS (Univ. of Kentucky College of Law 1977).

110. As the Pennsylvania court stated, "Employers in the private sector are motivated by the profit to be returned from the enterprise whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible." Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 264 (1975).

111. Summers, *supra* note 106, at 1164.

112. *Id.*

included the participation of various citizen and interest groups. With the introduction of collective bargaining, the decision making process was reduced to a bilateral process between the public employer and its employees. The extent of this reduction depends on how the scope of bargaining is defined. If the scope of bargaining is broadly defined, many significant topics previously subject to multilateral consideration are now subject to scrutiny only by the employee interest group. Consequently, public participation and influence in the political decision making is reduced and the influence of employee organizations is increased.

Reduction of public sector decision making from a multilateral to a bilateral process distorts public decision making if the employees receive a disproportionate amount of power *vis-a-vis* all other interest groups in the community.[113] Given the increased access and influence accorded the employee organization over all other interest groups where the operative constraint is political, it can be expected that any resulting decision will favor the employee organization. Because of this fundamental effect on the public sector decision making process, defining the scope of bargaining becomes critical. An extremely broad scope of bargaining in the public sector may cause decision making previously done after extensive public participation to be made at a bargaining table with public employees. This result adversely effects full public participation on public issues.

Because this potentially adverse effect on public sector decision making is not found in the private sector absent clear legislative intent,[114] PERBs and courts should not look to the private sector for

113. *Id.* at 1162-63.

114. As one author states, "Such blind deference to NLRA precedent . . . seem[s] unwarranted. If the legislature intended the state act to be construed in accordance with NLRA precedent, it could have so provided. For example, the California Agriculture Labor Relations Act provides that the Agricultural Labor Relations Board 'shall follow applicable precedents of the National Labor Relations Act as amended.' " Clark, *supra* note 13, at 97, *citing* CAL. LABOR CODE § 1148 (West. 1975).

115. Those courts which have relied on the private sector for the resolution of scope of bargaining issues often have been confronted with scope of bargaining language identical to or closely patterned after the federal act. However, even these courts recognize the distinction between the private and public sector and have relied on private sector precedent only to the extent it is applicable to the public sector. For example, despite the fact that the Michigan Act contains language identical to the federal act, the Michigan court concluded that it should rely on federal precedent only "to the extent that they apply to public sector bargaining." Detroit Police Officers Ass'n v. Detroit Police Dept., 61 Mich. App. 487, 490, 233 N.W.2d 49, 51 (1975). After recognizing that federal law may be helpful in resolving scope issues, however, the Michigan court concluded: "[W]e are compelled to fashion rules which recognize the special problems which exist in the public sector." Int'l Union of Operating Engineers v. Minneapolis, 305 Minn. 364, 368, 233 N.W.2d 748, 752 (1975). After looking at federal precedent, the court said that "[a]lthough these decisions may provide some guidance, we are mindful of the distinctions that necessarily must exist between legislation primarily

guidance in resolving scope of bargaining issues in the public sector.[115] How an issue was resolved in the private sector may provide no insight on how the issue should be determined in the public sector, and while the private sector experience under the NLRA is relevant in a number of areas,[116] the private sector experience in determining the scope of bargaining is not applicable. Accordingly, when a state PERB or court weighs competing employee or employer interests in a particular bargaining topic, it should do so in light of the unique effect collective bargaining has on public sector decision making.

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directed to the private sector and that for public employees." Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 264 (1975).

Where a court must resolve a scope of bargaining issue and the statutory language differs from the federal act, there is even less reason to rely on the private sector approach, absent a clearly expressed legislative intent. The same is true where a state act adds language not found in the federal act.

The statutory scheme for resolving scope of bargaining issues in Montana differs significantly from the federal act, in that scope questions must be resolved recognizing the particular "prerogatives of public employers." MCA § 39-31-303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(2) (Supp. 1977)). Thus, the resolution of scope of bargaining issues in Montana must be undertaken with a clear distinction between the public and private sectors.

116. For example, the Montana court properly has considered federal precedent regarding the term "employer" in construing the term under the Montana Act. *See* Local 2390, Am. Fed'n of State, County, and Mun. Employees, AFL-CIO v. Billings, 171 Mont. 20, 22, 555 P.2d 507, 508 (1976). Construction of "concerted activities" to include employee strikes under the federal act are also relevant in construing an identical provision in the Montana Act. *See* State Dept. of Highways v. Public Employees Craft Council, 165 Mont. 349, 351, 529 P.2d 785, 786 (1974) (reasoning that if the legislature intented to prohibit public employee strikes, it would not have used language from the federal act).

Another author has written "although N.L.R.B. decisions are not controlling . . . they are usually considered, and may well be persuasive, in circumstances . . . regarding an *appropriate bargaining unit* or the existence of an *unfair labor practice.*" Loring, *supra* note 16, at 48-49 (emphasis added). The determination of these questions requires consideration of various factors, most of which have been identified during the forty-year construction of the federal act. Their application to similar questions under the Montana Act is clearly appropriate.

The underlying issue in unit determinations is whether a group of employees shares a "community of interest" sufficient to place them within the same unit for collective bargaining purposes. The NLRB considers this standard along with underlying factors in making such a determination. *See* GORMAN, *supra* note 24, at 69. Thus, they are certainly applicable to identical questions in the public sector. The same is true in determining whether an unfair labor practice has been committed, in which case the issue is resolved by a common analysis which can be applied in most all circumstances. *See* Pa. Labor Rel. Bd. v. Mars Area School Dist., ___ Pa. ___, ___, 389 A.2d 1073, 1076 (1978).

Alternatively, when the issue involves the scope of bargaining in the public sector, the state tribunal must consider and decide the issue in light of the unique circumstances of the public sector and the impact the decision will have on public sector decision making. *See* text accompanying notes 103-05, *supra.*

3. *Public Sector Decison Making: The Role of Collective Bargaining*

Collective bargaining's impact on the public sector decision-making process not only reveals why reliance on the private sector model for resolving public sector scope of negotiation issues is inappropriate, but also provides an insight into public sector decision making. The public enterprise must ensure public participation in decisions that are of fundamental concern. This has traditionally been achieved through a decision-making process that encourages contributions from the often-conflicting community interests. Of course, not all public sector decisions are made after the public has been afforded an opportunity to participate. In fact, the great majority of decisions regarding the day-to-day operations are made without direct public participation. However, when the issue involves a fundamental policy question, it is likely that the public will seek to participate or such broad-based public participation will be sought. When fundamental public policy issues are at stake, the decison-making process should not be defined so as to preclude or inhibit public participation. To do so would announce the end of democratic control over public processes.

Multilateral public participation on fundamental issues not only distinguishes public sector from private sector decision making, but identifies those principles underlying public sector decison making. Collective bargaining, as discussed earlier, is a bilateral decison making process. This use of the bilateral decision making process is appropriate only when wider public participation is not necessary. The bilateral process is appropriate in the private sector on a wide range of subjects because the need for broader participation does not arise. However, when the topics in the public sector are of fundamental public interest, the bilateral process is inappropriate. Thus, the appropriateness of bilateral collective bargaining in the public sector depends on whether the issue involves fundamental public concern. If a fundamental concern is involved, public participation is required for its proper consideration and resolution, and the bilateral process is inappropriate. Any other conclusion would result in locking out the public from the formulation of public policy. If the issue is not of fundamental public interest it may be resolved in the bilateral process.

The recognition that some decisions require multilateral public participation, and the inappropriateness of the bilateral collective bargaining process to those decisions, is unique to the public sector. The scope of collective bargaining in the public sector depends upon the definition of those topics that are of fundamental public concern. Accordingly, the scope of collective bargaining in the public

sector involves a new element not present in the private sector: "the public interest." In the public sector two separate and distinct policy elements constitute employer prerogatives: the employer's interest in the operation and management of the public enterprise, and the public's interest in fundamental policy formulation. Of course, every public enterprise decision touches on some policy issues. This is equally true of every decision made and every issue considered during collective bargaining. However, this does not mean that every collective bargaining subject that affects the employer's managerial interest in policy implementation or the public's interest in policy formulation is exempt from collective bargaining. The balancing formula to measure and weigh the competing employee-employer interests must be used to determine whether the bargaining subject is mandatory or non-mandatory.

For example, there is general agreement that economic issues (that is, wages, hours, and fringe benefits) are mandatory subjects of bargaining, because the legitimate interests of the employees outweigh any employer policy implementation interests. In fact, because employer prerogatives are limited to "policy" issues, non-policy economic issues do not interfere with the employer's prerogatives. It could be argued that when the "public interest" component is added to the balancing formula, the balance shifts in favor of the employer and the public. However, this shift does not occur because public interest in economic issues is expressed in a non-bargaining forum.

Certainly, the taxpaying public will be concerned with the economic benefits paid to public employees, since the total amount directly affects government expenditures and tax levels. In an era of Proposition Thirteen-type state intiatives,[117] it would be ridiculous to suggest that the public is not interested in the amount of economic benefits paid to public employees. Indeed, these expenditures account for a significant amount of total government expenditures.[118] However, the exclusion of the direct public interest from the

117. Proposition Thirteen was a California state ballot initiative that required a reduction in property taxes.

118. Payroll cost in most cities constitutes 60 to 70 percent of the total operating budget. D. STANLEY, MANAGING LOCAL GOVERNMENT UNDER LOCAL UNION PRESSURE 120 (1972). In public education salaries and fringe benefits account for 65 percent. Simon, *The School Finance Decision maker: Collective Bargaining & Future Finance Systems*, 82 YALE L.J. 409, 413 (1973). Government is the country's largest industry and employer. Nearly 17 percent of all civilian employees work for federal, state or local government and school systems. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S. 343 (1975). Moreover, the most rapid rate of governmental employment growth is not at the federal level. The number of county employees in the U.S. rose by 4.9 percent in the year ending October 1975, as some 73,000 workers were added to county payrolls. This was the fastest rate of growth among all types of state and local government. State rolls increased by 3.6 percent; city employees were

collective bargaining process does not result in the total exclusion of the public interest. Rather, the public has an opportunity to participate on economic issues in the multilateral budget-appropriation process which precedes collective bargaining and determines the aggregate amount and allocation of public funds to be expended on employee economic benefits. In the event collective bargaining precedes budgeting, any collective bargaining agreement must condition economic benefits upon the appropriation of adequate funds.[119] Because the public is afforded this opportunity to participate, the "public interest" need not again be considered in the collective bargaining process.[120]

It has also been argued that bilateral collective bargaining on economic issues is appropriate because of the disproportionately large number of taxpayers who favor limiting taxes versus the number of public and non-public employees who favor increased tax expenditures.[121] Even though public employees will have more political influence on economic issues because of the bilateral process, this political influence is diminished when compared to the large number of non-public employee taxpayers who oppose increased government expenditures and may voice this opposition during budgeting and increased mill levy elections.

However, when the topic of negotiation shifts from economic to "policy" issues, the bilateral forum may be inappropriate because on any given "policy issue" there may not be any sufficient opposition on any particular issue to counterbalance the increased influence public employees gain from their bilateral forum. Without sufficient political strength to force public consideration of a significant policy issue, important policy would be determined in a forum where the only interest group represented was the public employees. If public policy is to represent the public interest, the forum in which it is determined must ensure, or at least permit, public par-

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reduced by 1.2 percent; federal employment during the same period remained nearly unchanged. LABOR RELATIONS YEAR BOOK 66-67 (Bureau of National Affairs, Inc. 1976).

119. The Montana Act specifically provides that the requirement of negotiating in good faith for state employers "may be met by submission of a negotiated settlement to the legislature in the executive budget, or by bill or joint resolution." MCA § 39-31-305(3) (1978) (formerly codified at R.C.M. 1947, § 59-1605(4) (Supp. 1977)).

120. After the budget-making process is complete, the public employer may, where lawful, abandon the budgeted line item monetary constraint on employee economic benefits in response to an unanticipated higher collectively-bargained economic package. However, he may do so only by decreasing other line items, such as the budgeted amount on plant and equipment, or by raising taxes. In either event the employer activities will not go unnoticed by the public. Because the public employer and the legislative body are politically responsible for the budget, their fluctuating responsiveness to the public in budget making and implementation will be evaluated and judged by the public. Accordingly, a public employer cannot long budget low and contract high without the tacit approval of the public.

121. Summers, *supra* note 106, at 1194.

ticipation. The bilateral forum excludes public participation and when fundamental public policy is formulated in a forum which excludes public participation, the process is contrary to the most rudimentary democratic principles.

It is not enough that the public employer is designated (by way of election or appointment) to act as the representative of the public. Certainly the public employer is the representative of the public, but democratic decision making envisions more than elections. It involves a continuing dialogue between the public and the representatives concerning the formulation of fundamental public policy.

It would be difficult to argue persuasively that once the public elected a school board, their participation in the formulation of fundamental school policy had ended, and that henceforth all school policy would be discussed and formulated in a decision making forum which excluded parents or any other public interest group except teachers. However, if fundamental school policy is determined within the scope of collective bargaining, this might occur because the formulation of school policy would be subject to the bilateral forum, which would exclude participation of all but the employees.

To allow public participation in public sector decision making *except* where the subject is raised during collective bargaining also would be acceptable. Frequently, the most significant policy issues are raised for the first time during contract negotiations. It would be impossible, absent actual public participation, for the public employer to foresee and evaluate the diverse comments the public might express. Actual participation is the cornerstone of democratic decision making. Replacing participation with a system where the public decision maker attempts to determine the public consensus without actual participation is not only at odds with democratic decision making, but will often result in inaccurate assessments of the public will. Public consensus is formulated through the actual exchange of ideas and participation, sparked by a proposal or event. A decision-making process which withholds the proposal or event from the public will not spark the necessary exchange of ideas. Any attempt to assess the direction of the public discourse, predict the formulation of alliances, the exertion of political pressures, or the point of consensus in the absence of such a discourse will be foolhardy as well as inaccurate.

Moreover, the public employer will not necessarily support the public consensus even if it can be accurately assessed.[122] The position of the public employer on a bargaining proposal may be at odds

122. *Id.* at 1196-97.

with the public interest. For example, suppose the bargaining representative of a group of police officers proposed the abolition of a public-controlled police review board. The public employer bargaining representative may favor the proposal despite the fact that the proposal significantly affects a policy issue about which the public is concerned.[123] Because the bargaining representative generally favors the proposal, it is unlikely that the public interest will be considered if the issue is confined solely to a bilateral collective bargaining forum. Similarly, where the topic of bargaining concerns a policy issue on which the employer and the employee representative have no expertise, yet expertise is available and would be considered in a multilateral forum, it is impossible for the public employer to represent the public interest.

It could be argued that the public can communicate its position on a topic to the public employer without preempting the collective bargaining process. The public would be expected to communicate its concern on fundamental policy issues prior to or contemporaneous with the bilateral collective bargaining process. In this manner, the public would participate in the decision-making process by making its concerns known to the public employer and not preempt bilateral collective bargaining. Thus, decision making would operate on a dual track; on a bilateral collective bargaining track, decisions may be made on matters of fundamental interest to the public and on a separate multilateral track in which the public would have an opportunity to express its views on public policy issues considered in collective bargaining. As a result, fundamental questions of public interest would not be exempt from collective bargaining if the issue was the subject of consideration in a multilateral forum.

From a theoretical perspective this approach has much appeal. Realistically, it is unworkable. First, the public will not be in a position to comment on bargaining proposals until the bargaining process has commenced. Typically, the public employee bargaining representative does not deliver its bargaining proposals until shortly before the actual bargaining process commences. Therefore, multilateral consideration prior to bargaining is limited to theoretical or anticipated bargaining proposals. It cannot be expected that the public would discuss such theoretical proposals or that the level of participation would be meaningful. Moreover, because employees traditionally seek more than they expect to gain in collective bargaining, it would be virtually impossible for the public employer to receive multilateral consideration on all the employee potential bar-

123. *See* San Jose Peace Officers Ass'n v. San Jose, 78 Cal. App. 3d 935, 948-9, 144 Cal. Rptr. 638, 647 (1978). *See also* Summers, *supra* note 106, at 1196-97.

gaining proposals. Only after it becomes clear, through the collective bargaining process, that a particular topic is a strong employee concern and may become part of the collective bargaining agreement will the public be aroused to participate. However, to ensure public input at this stage in collective bargaining would, as a practical matter, result in suspension of collective bargaining, and greatly increase the time necessary to conclude contract negotiations.[124] Moreover, if the collective bargaining process is open to multilateral consideration, it will be impossible to limit that consideration to specific issues. As a result, the entire collective bargaining process will be transformed into a public referendum. This would certainly be the demise of any meaningful bilateral collective bargaining.

Even if the risks involved were worth taking, it would be difficult for the public to learn of those bargaining proposals in which there was fundamental public interest. In many states, including Montana, collective bargaining sessions are exempt from open meeting legislation.[125] Accordingly, the public can be excluded from the collective bargaining sessions. Moreover, citizens are not entitled to receive copies of the collective bargaining proposals under state freedom of information legislation.[126] In other words, the public would have to rely on the negotiating parties to reveal which, if any, bargaining issues were of fundamental public interest. This is clearly unworkable as the parties will undoubtedly prefer to settle the issues themselves. Additionally, the determination of those issues of fundamental public concern should *not* be left to the negotiating parties to define. Frequently it is to the best advantage of both the public employer and the employee representative to withhold controversial topics from the public, especially if the bargaining parties have reached some mutually agreeable consensus on the particular topic.[127] Thus, reliance on the parties to divulge those topics of fundamental public concern often will be poorly placed.

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124. While multilateral consideration of an issue could continue on other topics, as a practical matter the most controversial issues to be considered are considered only after the less controversial issues are resolved. As a consequence, those issues which are of fundamental concern to the public will be delayed until the close of negotiations. If the collective bargaining process is suspended for a multilateral consideration of any one or a number of these remaining issues, it is highly likely that there will be other issues upon which the bargaining parties can continue negotiations on a meaningful basis.

125. *See* MCA § 2-3-203(3) (1978) (formerly codified at R.C.M. 1947, § 82-3402). *See also* Burlington School Dist. v. Public Employment Rel. Bd., 96 L.R.R.M. 2571 (Iowa Dist. Ct. 1977).

126. *See, e.g.*, Cohalan v. Bd. of Educ. of Bay-Port-Blue School Dist., 99 L.R.R.M. 2465 (N.Y.S.C. 1978). In Montana the public is entitled to inspect and copy "public writings," *see* MCA § 2-6-102 (1978) (formerly codified at R.C.M. 1947, § 93-1001); but it cannot be argued that an agreement in the process of being negotiated is a public writing. *See* MCA § 2-6-101 (1978) (formerly codified at R.C.M. 1947, § 93-1001).

127. *See* text accompanying notes 121-23, *supra*.

Finally, it has been argued that the consideration of fundamental public policy topics in bilateral collective bargaining does not adversely affect public policy decision making. The public employer is only required to bargain in good faith. He is not required to agree to the collective bargaining position advocated by the employee representative.[128] As previously discussed, if the topic is a mandatory subject for negotiation, the public employer need not make any concession on the topic. However, the fact that the public employer is not required to agree to the position of the employee representative is an inadequate reason to conclude that fundamental policy decisions are appropriate for consideration in a bilateral collective bargaining forum. If a topic is appropriate for decision making solely in a multilateral forum where all interest groups may participate, consideration of the topic should not be limited to a bilateral setting. It is ridiculous to require an employer to bargain in good faith in a bilateral forum on a topic that is appropriate solely in a multilateral forum. If the employer recognized the multilateral nature of the topic and refused to bargain, he is subject to an unfair labor practice charge for failing to bargain on a mandatory subject.[129] If he agress to bargain, but recognizes that because of the forum an agreement would be inappropriate, he again may be charged with an unfair labor practice for failing to bargain in good faith.[130] The employer is caught in a "Catch 22." Accordingly, if consideration of a particular bargaining topic is appropriate in only a multilateral forum, its consideration should not be mandated in a bilateral forum.

4. *Legislative Foundations for Public Interest Considerations*

Although courts recognize the crucial role that the "public interest" plays in deciding scope-of-bargaining questions, they have

128. *See* Weisberger, *supra* note 13, at 719; Seitz, "School Board Authority and the Right of Public School Teachers to Negotiate—a Legal Analysis," 22 VAND. L. REV. 239, 253 (1969); Joint School Dist. v. Wis. Employment Rel. Bd., 37 Wis. 2d 483, 488, 155 N.W.2d 711, 712 (1971).

129. *See* State College Educ. Ass'n v. Pa. Labor Rel. Bd., 9 Pa. Commw. Ct. 229, 235-36, 306 A.2d 404, 408-09 (1973), *rev'd on other grounds*, 461 Pa. 494, 337 A.2d 262 (1975).

130. San Jose Peace Officers Ass'n v. City of San Jose, 78 Cal. App. 3d 935, 948, 144 Cal. Rptr. 638, 646 (1978).

It consistently has been determined if an employer commences collective bargaining on a mandatory subject with a non-compromising position against the proposal and refuses to negotiate on the subject, the employer may be found to have refused to bargain in good faith. Moreover, an employer may not merely go through the motions of collective bargaining by an elaborate pretense of empty talk and surface motions without a sincere desire to reach an agreement. The employer must enter negotiations with an open mind on the topic for good faith negotiations to occur. However, if the topic may be considered only in a multilateral forum, it is senseless to shackle the public employer with totally inconsistent duties—a duty to the employees to bargain and a duty to the public not to agree.

often been less than candid in identifying the legislative basis for their determination. Frequently, public employee collective bargaining legislation explicitly states that an underlying policy of public sector bargaining is the furtherance of the "public interest." Courts may rely on this explicit legislative purpose as authority for consideration of the "public interest" in deciding the scope-of-bargaining questions. Even when the legislation does not specify a "public interest" purpose, proper construction requires that the legislation be construed in a manner consistent with the public interest.[131] This is particularly true when the legislation is directed at the regulation of the public enterprise. Certainly, the scope of collective bargaining in the public sector cannot be defined in a manner inconsistent with public interest.

The Montana Act specifically provides that "[i]n order to *promote public business* . . . it is the policy of the state to encourage . . . collective bargaining to arrive at friendly adjustments of all disputes between public employers and their employees."[132] To insure the promotion of the "public business" the scope of public employee collective bargaining must reflect the public interest. The balancing formula, used to define whether a topic is a mandatory subject of bargaining, must reflect the public interest. Thus, the balancing formula must reflect not only the interests of the employees and managerial interests of the employer, but the interest of the public as well.

Some courts have used an alternative approach, the delegation theory, for concluding that the scope of bargaining must reflect the public interest. Under this theory, the public employer has been delegated the authority to act in the public interest by the state constitution or the legislature. It cannot evade that responsibility by delegating authority or a portion thereof to any group.[133] These courts reason that when the collective bargaining process involves issues of public policy,[134] the determination of public policy is trans-

131. *See, e.g.*, State College Educ. Ass'n v. Pa. Labor Rel. Bd., 9 Pa. Commw. Ct. 229, 241-42, 306 A.2d 404, 412 (1973), *rev'd on other grounds*, 461 Pa. 494, 337 A.2d 262 (1975).

132. MCA § 29-21-101 (1978) (formerly codified at R.C.M. 1947, § 59-1601 (Supp. 1977)).

133. *See* Bd. of Trustees v. Cook City College Teachers' Union, ___ Ind. ___, ___, 343 N.E.2d 473, 476 (1976); Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 750, 512 P.2d 426, 433 (1973); School Comm. of Braintree v. Raymond, ___ Mass. ___, ___, 343 N.E.2d 145, 148 (1976); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 781, 199 N.W.2d 752, 758 (1972); Ridgefield Park Educ. Ass'n v. Bd. of Educ., ___ N.J. ___, ___, 393 A.2d 278, 288 (1978); Cohoes City School Dist. v. Cohoes Teachers' Ass'n, 42 N.Y.2d 774, 358 N.E.2d 878, 879 (1976).

134. Early in the history of public employee collective bargaining legislation, some courts relied upon similar constitutional provisions as a basis for holding that all public sector collective bargaining is unlawful because it represents an unconstitutional delegation of au-

ferred from the public entity to an employee group. Because this transfer of responsibility is prohibited, the public entity is not required to bargain on public policy issues. Thus, public policy issues are non-mandatory.[135] For example, the Montana Constitution provides that "supervision and control of schools in each school district shall be vested in the board of trustees . . . ."[136] Under the delegation theory argument, Montana school boards may not delegate their authority regarding the "supervision and control" of the schools because the school board is given exclusive control in this area of decision making.

Regardless of whether the courts construe the collective bargaining legislation or use the delegation theory, there is general agreement that bargaining issues which have a significant impact upon the determination of policy are employer prerogatives. Accordingly, employer prerogatives represent the employer managerial interests in policy implementation and the public's interest in policy formulation.[137]

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thority in violation of the unilateral process mandated by their constitutions. *See, e.g.*, Hagerman v. City of Dayton, 147 Ohio St. 313, 329, 71 N.E.2d 246, 254 (1947). In recent years courts that continue to rely on the delegation theory have retreated from this position and now hold that collective bargaining represents an unconstitutional delegation of authority only when policy issues are involved. *See* note 133, *supra*.

135. As the New Jersey court has indicated, "surely the legislature in adopting the [public employment bargaining act] did not contemplate that the local boards of education would or could abdicate their management responsibilities for local education policies or that the state educational authorities would or could abdicate their management responsibilities for the state educational policies." Dunellen Bd. of Educ. v. Dunellen Bd. of Educ. Ass'n, 64 N.J. 17, 25, 311 A.2d 737, 741 (1973).

136. MONT. CONST. art. 10, § 8.

137. The unlawful delegation concept is most often used to refer to a legislative grant of rulemaking authority to administrative agencies, *see, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1937); the executive branch, *see, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); or private groups, *see, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936). The federal courts have in recent years appeared to abandon the delegation doctrine, at least in the first two categories in which state courts continue to rely on the doctrine. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT [hereinafter cited as DAVIS] § 26-52 (3d ed. 1972). *See also* Bacus v. Lake County, 138 Mont. 69, 81, 354 P.2d 1056, 1062 (1960); Huber v. Groff, 171 Mont. 442, 458, 558 P.2d 1124, 1133 (1976).

Courts have used the doctrine to prohibit legislative delegation of rule-making authority where the legislature has failed to establish standards for guidance in the exercise of the rulemaking authority. DAVIS at § 31; *Bacus*, 138 Mont. at 81, 354 P.2d at 1062. However, when the delegation doctrine is applied to public sector collective bargaining, courts frequently do not look for guidelines, but emphasize the hierarchy of delegated authority from the people to the constitution to the legislature to the individual public employer. *See* note 133, *supra*. The fact that the delegation doctrine as applied to the collective bargaining process, emphasizes the hierarchy of authority rather than legislative guidelines has resulted in criticism regarding the applicability of the doctrine. *See Four Approaches, supra* note 7, at 451-59.

The critics, however, fail to recognize that the delegation doctrine is merely an alternative method of emphasizing that the public employer, as opposed to its private sector counterpart, is directed to act in the public interest and that it cannot exclude the public from the decisions regarding public policy.

5. *The Balancing Process in Summary*

When the bargaining topic involves the interest of the employees in wages, hours, fringe benefits, and other conditions of employment, and the public employer's managerial interests in policy implementation (or the public's interest in policy formulation), the decision maker must evaluate and weigh these conflicting interests to determine whether the subject is mandatory or non-mandatory. The weight of the public interest, together with any separate management interest of the public employer, must be balanced against the interest of the employees to determine whether the topic is mandatory or non-mandatory.

IV. Application of the Balancing Formula to Primary and Secondary Education Collective Bargaining

Given this analytical approach, the next step is to evaluate its application to actual collective bargaining subjects. This analysis will focus on scope-of-bargaining questions that occur in primary and secondary education. However, as previously noted, the analytical approach is applicable to all public sector bargaining.

A. *Mandatory and Non-Mandatory Subjects of Collective Bargaining*

Despite the fact that the majority of courts use the balancing test to determine the mandatory or non-mandatory status of bargaining topics that have an impact upon conditions of employment and employer prerogatives, the decisions are hardly uniform. Apart from their legislative differences, the courts' decisions have been more conclusional than analytical. In those instances where judicial analysis exists, the analysis frequently is so superficial that it is impossible to discern any guidelines which may be applied with certainty in any future cases. Often it appears that the decisions coming from PERBs are nothing more than a series of conclusions. However, if balancing is prefaced with full recognition, identification, and consideration of employee interests in wages, hours, fringe benefits and other conditions of employment, employer interests in the operation and management of the public enterprise and the interest of the public in the determination of policy, the balancing process will result in fair and analytical decisions which will provide much needed guidelines.

1. *Classroom Size*

A topic that has given PERBs and courts a great deal of difficulty is the subject of classroom size, or the maximum number of

students a teacher must instruct in a given class. Teacher bargaining proposals on class size are generally one of two types: (1) the teachers demand salary increases in excess of those established in the salary scale for each additional student in excess of a bargained classroom size; or (2) the teachers demand a certain maximum classroom size, and if student enrollment increases beyond that agreed maximum, the school board is required to create an additional class and hire additional faculty. The first class size proposal is a mandatory subject. The topic is primarily an economic subject related to the rate of pay teachers are to receive. When the number of students in a classroom exceeds a certain established number, the teacher receives an increased rate of pay. As the number of students a teacher is called upon to instruct increases, the greater the teacher workload. If salaries are to reflect workloads, at least in part, and workloads increase, salaries should increase. Because the topic clearly relates to the mandatory subject of "wages" and does not raise any non-economic policy issues, balancing of interests is unnecessary and the topic is considered mandatory.

The second class size proposal requires the balancing of interests. The negotiating teachers do not seek increased economic benefits in the event of class size increases. Rather, they seek to compel the school board to create an additional class and hire more teachers. Although the courts that have considered this issue are split, a majority holds the topic to be non-mandatory.[138] The minority of courts has concluded that class size is directly related to the amount of work expected for a given rate of pay and thus is a condition of employment and a mandatory topic. As one court observed, the number of students affects the teacher's control and discipline, teaching and communication, and the total amount of work required for a fixed salary.[139] On the other hand, the majority of courts maintains that the establishment of a maximum class size is a basic

138. Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 752, 512 P.2d 426, 435 (1973); School Dist. of Seward Educ. Ass'n v. School Dist., 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972); West Irondequoit Teachers Ass'n v. Helsby, 35 N.Y.2d 46, 52, 358 N.Y.S.2d 720, 723, 315 N.E.2d 775, 778 (1974); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 133, 215 N.W.2d 837, 841 (1974). *Contra,* Clark County School Dist. v. Local Gov't Employee Management Rel. Bd., 90 Nev. 442, 448, 530 P.2d 114, 118-19 (1974) (the Nevada statute since has been changed and the topic now would be non-mandatory; *see* note 44, *supra*); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 586, 295 A.2d 526, 537 (1972). The following cases have held the topic to be permissive: Boston Teachers' Union v. School Comm. of Boston, 370 Mass. 455, 462, 350 N.E.2d 707, 714 (1976); Bd. of Educ. v. Greenburgh Teachers' Federation, 51 App. Div. 2d 1039, 381 N.Y.S.2d 517, 518 (1976); City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 64, 242 N.W.2d 231, 241 (1976). For a discussion of permissive bargaining topics, *see* text accompanying notes 156-64, *infra.*

139. Clark County School Dist. v. Local Gov't Employee Management Rel. Bd., 90 Nev. 442, 448, 530 P.2d 114, 118-19 (1974).

element of educational policy bearing on the quality and quantity of education rendered to the community and is thus an employer prerogative.[140]

This bargaining topic illustrates well the conflict between the statutory duty to bargain concerning wages, hours, fringe benefits and other conditions of employment, and employer prerogatives. The topic fits nicely within either category.[141] Unquestionably, the topic of maximum class size affects employee interests in the mandatory subjects of bargaining "wages, hours, fringe benefits and other conditions of employment." The more students with whom a teacher must work, the greater the teacher workload; that is, the amount of work for a given wage. If it can be argued that a bargaining topic which mandates increased faculty salaries whenever class size exceeds established amounts is an economic issue and mandatory, then a topic that requires the school board to expend money for additional faculty if the maximum class size is exceeded is also solely economic, and thus mandatory. To state it another way, if paying existing faculty more money under certain circumstances is economic, then hiring additional faculty under the same circumstances is also economic (it requires an expenditure of funds on additional faculty rather than the additional expenditure of funds on existing faculty) and mandatory.

The Montana Act, however, specifically recognizes that the authority to "hire" is an employer prerogative.[142] Moreover, other state courts have recognized that the authority to hire is an employer prerogative, even in the absence of such specific legislation.[143] Even so, the mere fact that a topic touches upon an employer prerogative does not necessarily remove it from mandatory negotiation. The decision maker must first define the extent of the impact upon the employer's prerogatives and then balance the impact against the employee interest in the subject.

The teachers will acknowledge that the proposal requires the employer to "hire" additional faculy if the maximum class size is exceeded, but they will argue that any proposal which results in a reduced teacher workload would have the same effect, and work reduction proposals are mandatory subjects of bargaining. Manda-

140. *See, e.g.*, West Irondequoit Teachers' Ass'n v. Helsby, 35 N.Y.2d 46, 52, 358 N.Y.S.2d 720, 723, 315 N.E.2d 775, 778 (1974).

141. The Wisconsin court recognized this in relation to class size in City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 45, 242 N.W.2d 231, 235 (1976).

142. MCA § 39-31-303(2) (1978) (formerly codified at R.C.M. 1947, § 59-1603(b) (Supp. 1977)).

143. School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 26, 311 A.2d 737, 741 (1973).

tory employee workload topics affect the employer's hiring decisions and the mandatory class size topic does not impose any greater impact on hiring and therefore it should be accorded similar mandatory status.

The school board will argue that the class size proposal, unlike general work reduction proposals, mandates hiring additional faculty whenever class size exceeds a certain maximum. Accordingly, the class size proposal removes two major incidents of hiring from the employer: "Whether to" and "when to" hire, whereas most work reduction proposals leave these crucial decisions to the employers. Under a typical work reduction proposal, the employer is free to reduce the services offered, but it hardly can say to a group of fourth grade students that they may not attend school because an additional teacher will not be hired to handle the excess of the maximum class size. Thus, from the employer's perspective, while all work reduction proposals generally have an impact on hiring, the class size proposal "directly" affects and "significantly" removes the critical incidents of the hiring decision from the employer.

The teachers would then assert that the removal of the school board's unilateral discretion "whether to" and "when to" hire in this limited area is not a significant inroad on managerial prerogatives. Rather, the ultimate issue of hiring is based on a contingency that may never occur—increased enrollment. Moreover, the teachers will argue that because of their professional standing and concern for quality education, they are in a particularly strong position to speak on the issue of class size. This argument raises the second component of employer prerogatives, the issue of policy formulation.

Admittedly, teachers have a great deal of expertise and a strong professional interest on this issue of educational policy.[144] The ques-

144. It has been recognized that a public employer must recognize the professional concerns of professional employees. *See* Clark County School Dist. v. Local Gov't Employee Management Rel. Bd., 90 Nev. 442, 445, 530 P.2d 114, 116 (1974); Fargo Ed. Ass'n v. Paulsen, 239 N.W.2d 842, 848 (N.D. 1976). *See also Four Approaches, supra* note 7, at 472. For example, "Teacher organizations have been leaders in organized labor's fight to open up the range of bargainable issues to include almost every conceivable item that would even remotely affect their terms and conditions of employment." Metzler, *The Need for Limitation upon the Scope of Negotiations in Public Education*, 2 J. L. & EDUC. 137, 145 (1973). This drive to open the range of bargainable issues has frequently resulted in demands to bargain on matters of fundamental school policy. One author has indicated that the reason for this is because: (1) teachers are all professionals with an interest and expertise about many policy decisions; and (2) many policy decisions which would have no effect on terms and conditions of employment of many non-professional workers do have an effect on the working conditions of teachers.

Alleyne, *supra* note 13, at 112. Additionally, where professional employers recognize that their monetary demands will go unanswered, they turn to policy issue negotiation. *See* Note, *Collective Bargaining and the Professional Employee*, 69 COLUM. L. REV. 277, 291-92 (1969).

tion, however, is whether educational policy should be considered in the bilateral collective bargaining forum, or in the broader multilateral forum which includes all interest groups.[145] The public interest in this policy determination looms large. Parents will be extremely concerned about the maximum number of students in a classroom. The establishment of a maximum class size will have a significant impact on quality education, an issue which will be of community interest.

In addition to the quality of education, the public will be concerned with the potential monetary cost of establishing maximum class sizes. As previously indicated, when the bargaining topic raises only an economic issue, courts have held that the bilateral collective bargaining process is a sufficient forum in which to decide the issue. The public has an opportunity to participate in financial decisions at the multilateral budget sessions. But where a bargaining topic commits a public entity to an undetermined financial expenditure involving major potential capital improvements, public consideration of the ramifications must precede contractual commitment.[146] Unless the school has excess fiscal capacity, additional classrooms must be made available to accommodate the additional classes. This will involve large capital expenditures for building, fixtures, and equipment. Even if the present facility can accommodate the

145. Thus, the fact that the public employees may have a professional interest in an issue involving fundamental school policy does not mean that the topic becomes a mandatory subject of bargaining. As the New Jersey court has recognized:

> The holding that the [issue] was predominately a matter of educational policy not mandatorily negotiable does not indicate that the school board would not have been well advised to have voluntarily discussed it in a timely fashion with the representatives of the teachers. Peaceful relations between school administration and its teachers is an ever present goal and though the teachers may not be permitted to take over the educational policies entrusted . . . to the Board they as trained professionals may have much to contribute towards the Board's adoption of sound and suitable educational policies.

Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31-32, 311 A.2d 737, 744-45 (1973).

Employee professional interest together with the interests and ideas of parents, other public groups and individuals and non-employee professionals should all be considered in the formulation of fundamental school policy. This, of course, is the role of a multilateral decision-making forum.

Some state legislation has specifically recognized the need for public employee participation in certain policy issues. *See, e.g.*, PA. STAT. ANN. tit. 43, § 1101.702 (Purdon Supp. 1978) (policy matters affecting wages, hours, and conditions of employment). *See also* Comment, *Determining the Scope of Bargaining under the Indiana Education Employment Rel. Act*, 49 IND. L.J. 460 (1974), for an analysis of the Indiana law in this regard.

146. "[I]f a demand for lowered classroom size were to require the construction of a new school building for the reduced-in-size classes, relatedness to management and direction of the school system is obvious. Would such required result of a new building not be a matter on which groups involved, beyond school board and teachers' association, are entitled to have their say and input?" City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 53, 242 N.W.2d 231, 235-36 (1976).

additional classes, they undoubtedly cannot be added without changing the class schedule, extending the school day, or implementing a double shift. To this extent, a bargaining proposal establishing maximum class size involes questions of educational policy formulation in which the public has a significant interest.

After identifying the competing employee, employer, and public interests, it is the decision maker's responsibility to balance these competing interests and determine the mandatory or non-mandatory status of the topic. The interest of the teachers, both in terms of workload and professional standing[147] in the establishment of a maximum class size, must be balanced against the public manager's loss of two major incidents in its prerogative to "hire," together with the public's interest in the formulation of educational policy. From the scenario presented, it appears that the majority of the courts have correctly found the topic of mandatory class size to be non-mandatory. The employer's interests and the public's interest outweigh the teachers' interest.

2. *Curricula*

Bargaining proposals designed to provide for greater teacher involvement in determining school curricula have received much judicial attention. Despite varying approaches, the courts have generally held that the content of school curricula is a non-mandatory subject of bargaining.[148] The proposed balancing formula will most often confer the same result, but the balancing formula offers a context that recognizes the legitimate competing interests involved and provides an appropriate method for adequately evaluating particular proposals. Thus, the court would escape the conclusionary pitfall of determining that every proposal with any remote impact upon curricula was non-mandatory.

Suppose the teachers seek to bargain on a proposal that places curriculum decisions in the hands of a committee consisting of an equal number of school board members and teachers. The topic of school curricula does not relate to "wages, hours, or fringe benefits," and thus is not economic. The issue, however, does involve two legitimate teacher bargaining interests: the type of work the teachers are expected to perform and their professional interest in curric-

147. *See* notes 144 and 145, *supra.*

148. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 586, 295 A.2d 526, 537 (1972); Nat'l Educ. Ass'n v. Bd. of Educ., 212 Kan. 741, 752, 512 P.2d 426, 434 (1973); School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972); Aberdeen Educ. Ass'n v. Aberdeen Bd. of Educ., 88 S.D. 127, 133, 215 N.W.2d 837, 841 (1974); Joint School Dist. v. Wis. Employment Rel. Bd., 37 Wis. 2d 483, 493, 155 N.W.2d 78, 82-83 (1967).

ulum development. Therefore, it falls within "other conditions of employment." But before the bargaining status of the topic can be determined, the legitimate teacher interest must be balanced against any interest of the employer-public.

The formulation of public school curricula clearly involves an issue of educational policy. Determining what is to be taught in a public school goes to the heart of educational policy formulation. Most assuredly, the public will be concerned with this subject and will desire to make its views known. The collective bargaining forum limits the participants to the teachers and the school board; it precludes public participation.

Before actually weighing the competing interests of teachers and the public in this subject, it must also be determined whether the curricula issue infringes upon any managerial interest of the public employer regarding the operation, management, or implementation of school policy. Unlike the issue of maximum class size, the Montana Act does not specifically provide that curriculum issues are employer prerogatives.[149]

Indeed, it is difficult to see how the determination of curricula has an impact upon any of the specified employer prerogatives. Moreover, even though the Montana Act does not limit the employer prerogatives to those specified, it is hard to imagine how the curriculum decisions affect school operation, management, or policy implementation. Rather, the issue appears to be one of policy formulation. The bargaining status of the issue depends solely upon whether the teachers' interest in this subject is sufficient to require that the issue be considered in a collective bargaining forum.

While the general conclusion is that issues of curriculum are non-mandatory subjects of bargaining, the use of the balancing formula recognizes the legitimate interest of the parties concerned, and it requires open consideration of the conflicting interests. Moreover, the balancing formula quickly reveals that not every potential topic involving teacher participation in the formulation of curriculum decisions will be non-mandatory. For example, if the teachers' bargaining proposal sought to have school curriculum decisions made in an open forum by representatives of the teachers, school board, and public, the subject would be considered mandatory. Under this proposal, public participation is built into the decision-making process, thus fulfilling the public interest requirement. The balancing formula recognizes that not all bargaining topics which have been declared non-mandatory will in fact be determined non-mandatory

149. MCA § 39-31-303 (1978) (formerly codified at R.C.M. 1947, § 59-1603(2) (Supp. 1977)) (text accompanies note 26, *supra*).

where the interest of the teachers outweighs the interest of the employer-public. In the final analysis, the balancing formula provides great assistance in resolving whether a specific topic is mandatory or non-mandatory; it also provides assistance to the bargaining parties in designing appropriate bargaining subjects and evaluating the mandatory or non-mandatory nature of a given bargaining proposal. The beauty of the balancing formula lies in its simplicity and flexibility.

3. *"Impact" Bargaining*

While the balance of the competing interests may be in favor of treating a given topic as non-mandatory, that determination does not necessarily preclude the topic from being mandatory. In other words, while the topic may be considered non-mandatory, the impact of the topic on the employees may require mandatory bargaining. Some courts that have determined maximum classroom size[150] or curriculum decisions[151] to be non-mandatory topics also have held that the "impact" of increased enrollment or curriculum decisions on teachers requires mandatory bargaining. Thus, school boards must bargain on an array of topics dealing with the impact of increased enrollments on teachers, including increasing teachers' salaries and benefits. Similarly, courts have held that to the extent school board decisions change existing curricula, programs, and extracurricular activities, and to the extent those changes affect teacher interests in wages, hours, fringe benefits, and other conditions of employment, the impact of the change on the teachers is a mandatory subject of bargaining.[152]

For example, while the decision concerning the existence and scope of extracurricular activities has been held a non-mandatory subject of bargaining, the school board cannot assign teachers to supervise these extracurricular activities or establish the rate of compensation for such teacher supervision without first negotiating with the teachers. The assignment of additional duties and the determination of compensation are within the mandatory subjects.[153]

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150. West Irondequoit Teachers' Ass'n v. Helsby, 35 N.Y.2d 46, 52, 358 N.Y.S.2d 720, 723, 315 N.E.2d 775, 778 (1974); City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 64, 242 N.W.2d 231, 241 (1976).

151. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 581, 295 A.2d 526, 535 (1972); Bd. of Educ. v. Asbury Park Educ. Ass'n, 145 N.J. Super. 495, 507-08, 368 A.2d 396, 402-03 (1976); City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 64, 242 N.W.2d 231, 241 (1976).

152. *See* note 151, *supra*.

153. As the Connecticut court stated:

> There can be no doubt that the defendant board of education alone is empowered to determine whether there shall be extracurricular activities and what such

The result in Montana is somewhat complicated by the fact that the Montana Act specifically provides that the authority to "transfer" or "assign" employees is an employer prerogative.[154] However, while the school board may "transfer" or "assign" teachers to additional duties, it will be required to bargain regarding the impact that the assignment or transfer has on mandatory subjects of bargaining. To state it another way, if the assignment to supervise the extracurricular activities results in an additional work burden, the board is required to bargain on those issues coming within wages, hours, fringe benefits, and other conditions of employment.[155]

B. *Permissive Subjects of Collective Bargaining*

If a subject is non-mandatory and the school board thus is not required to bargain on the subject, may it agree to so bargain? This issue often arises when the board agrees to bargain on a non-mandatory subject, reaches agreement, and includes the agreement in the final collective bargaining agreement. Subsequently, the teachers attempt to enforce the contract provision regarding the subject, and the school board argues that the subject not only was non-mandatory, but also non-permissive, making the contract provision void.[156]

The school board maintains that if the "public interest" regarding a non-economic policy issue is sufficient to mandate multilateral consideration, the issue is non-mandatory, and also non-permissive. If the policy topic requires multilateral consideration, the public employer may not repudiate the public's interest and address the issue in a bilateral collective bargaining setting. The public's interest in the subject is separate and distinct from the employer-manager's interest. Thus, while the employer may voluntarily waive

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> activities shall be . . . . The assignment of teachers to such activities and the question of compensation for such extracurricular activities affect salaries and other conditions of employment . . . are to that extent only, mandatory subjects of negotiation.

West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 586-87, 295 A.2d 526, 537 (1972).

154. MCA § 39-31-303(2) (1978) (formerly codified at R.C.M. 1947, § 59-1603(b) (Supp. 1977)).

155. Moreover, to the extent that the assignment will be directed at only certain teachers, the board may be required to bargain regarding the method used to determine who will be assigned the additional work. Thus, even though the Act specifies that the authority to "assign" is an employer prerogative, it does not necessarily mean every decision concerning "assignments" will be non-mandatory. *See* notes 150 and 151, *supra* and text accompanying notes 150-53, *supra*.

156. Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31, 311 A.2d 737, 744 (1973). *See also* Boston Teachers Union, Local 66 v. School Comm. of Boston, ___ Mass. ___, ___, 350 N.E.2d 707, 714 (1976); Bd. of Educ. v. Greenburgh Teachers Federation, 51 App. Div. 2d 1039, 381 N.Y.S.2d 517, 518 (1976).

its interest in the subject, it cannot waive the interest of the public, and any agreement that purports to do so is void. Enforcement of the agreement would undermine the recognized need for multilateral consideration of the issue[157] and would waive the public's legitimate interest in the subject.[158]

The potential for the public employer to unilaterally disregard the public interest and bargain with the employee representative has led many to conclude that there are no permissive subjects of bargaining in public employment.[159] Either the subject is mandatory or it is prohibited. This approach is unnecessarily narrow, for it is possible to protect the legitimate public interest and yet authorize a range of permissive subjects of bargaining.

Permissive subjects arise in two situations. The first occurs when the employer waives its interest in the bargaining subject, and as a result, the subject loses its non-mandatory status. Prior to the waiver, the topic is non-mandatory because the weight of the employer interest together with any separate "public" interest is greater than the interest of the employees. But when the managerial interest is waived, the employee interests weigh more than any separate "public" interest and the topic becomes open for bargaining.

Suppose the teachers seek a contract provision that no teacher with more than five years of seniority will be assigned "hall duty." The school board realizes the Montana Act specifically provides that the authority to "assign" employees is an employer prerogative, but rather than argue, the board consents to bargain on the subject and agreement is reached.[160] There is little or no "public interest" in the subject, and when the employer waives its interest the subject becomes open for bargaining.[161]

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157. *See* Ridgefield Park Educ. Ass'n v. Bd. of Educ., ___ N.J. ___, ___, 393 A.2d 278, 287 (1978).

158. Disregard of public interest becomes extremely critical when the positions of the public employer and public employee are similar. *See* text accompanying notes 122 and 123, *supra:*

159. Ridgefield Park Educ. Ass'n v. Bd. of Educ., ___ N.J. ___, ___, 393 A.2d 278, 287 (1978). *See* Summers, *supra* note 106, at 1193-94; Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations,* 30 MD. L. REV. 179, 189 (1970); Sackman, *supra* note 13, at 189-94.

160. *See* note 155, *supra.*

161. There are, of course, subjects which are non-mandatory and non-permissive. An example of this type of subject is a bargaining issue which directly affects the content of school curriculum, such as the creation of special programs or the establishment of extracurricular activities. As previously noted, courts have generally held that curriculum decisions, as opposed to the manner in which those decisions are reached, are non-mandatory subjects of bargaining. *See* note 148, *supra.* However, assume that the school board voluntarily agrees to bargain on the determination of curriculum decisions, agreement is reached, and the agreement is included in the final collective bargaining agreement. Thereafter, the school board refuses to follow the contract provision and alleges that the topic is non-mandatory and

The second situation involving a permissive subject arises where the bargaining topic could never reach mandatory status because the topic in the first instance does not represent a subject in which the employees have a significant interest in "wages, hours, fringe benefits, or other conditions of employment." But if there is no adverse "public" interest in the topic and the public employer-manager chooses to bargain on the subject, the subject becomes open for bargaining. Suppose, for example, public school classrooms are to be painted. The teachers want the classrooms painted a color other than presently planned. It is difficult to conclude that this raises a significant issue relating to "wages, hours, fringe benefits, or other conditions of employment."[162] Accordingly, the topic could never be mandatory. But suppose the employer-manager agrees to the employee bargaining proposal. There clearly is no weighty public interest in the subject, and since the employer has elected to waive his interest in the subject, the subject is permissive, and any agreement reached should be given validity.

In either situation, the decision of the employer to waive its interest in the subject and bargain does not adversely affect any fundamental public interest which would necessitate multilateral consideration. Either the employees' legitimate interest in the mandatory subjects of bargaining outweighs the public policy interest, or despite the fact the subject does not raise a legitimate interest in a mandatory subject category, there is no public policy interest in the subject.

However, the Montana Act specifically prohibits school boards from engaging in the second category of permissive bargaining. The Act prohibits school boards, as opposed to all other public employees, from bargaining "upon any matter other than [wages, hours, fringe benefits, and other conditions of employment]."[163] Thus, a Montana school board may enter permissive negotiations only where the bargaining topic involves a subject in which the employees have a significant interest in "wages, hours, fringe benefits, or

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non-permissive. This topic is considered non-mandatory, not because of a strong school board interest in the operation and management of the school, but rather because of a strong public interest in multilateral consideration of school curriculum and program decisions. An effort by the school board to waive its managerial interest in this topic and confine the decision to a bilateral decision-making process will not effectively waive the public interest, and insofar as the public interest outweighs the teacher interest, the topic is non-permissive and the contract provision is void.

162. It could be argued that the color of the work place affects the employee-employer relationship because the work place color has an impact upon the psyche of the employees, thereby affecting their performance, and thus is a condition of employment. The potential for such an argument is somewhat lessened by limiting mandatory topics to "significant" issues relating to "wages, hours, fringe benefits or other conditions of employment."

163. MCA § 39-31-304(1978) (formerly codified at R.C.M. 1947, § 59-1617 (Supp. 1977)).

other conditions of employment," and the public interest standing alone will not outweigh the employee interest.

It could be argued that even when the topic involves one of those items, there is insufficient adverse "public" interest in the topic, the public employer may not waive its managerial interest and engage in permissive negotiations if the employer's interest is derived from the Montana Act. The question is whether the public employer can waive a managerial prerogative recognized by the legislature. Absent a clearly expressed legislative intent that subjects included in the statutory employer prerogatives clause, which only affect the managerial interest of the public employer, were intended to be non-permissive as well as non-mandatory, this conclusion should not be drawn.

As previously noted, public employment involves two inherent limitations on the scope of bargaining. First, the inherent interest of the employer in operating and managing the enterprise, and second, the inherent interest of the public in ensuring that the public enterprise is operating in conformity with the public interest. The interest of the employer and the interest of the public are jointly recognized as employer prerogatives. Where the public employer voluntarily waives its interest on a subject involving the operation and management of the enterprise, that management determination should be controlling. The public manager is in the best position to evaluate its particular interests during contract negotiations. Thus, when the public manager determines that a concession on a given subject will enhance its overall bargaining position and the ability to operate the public enterprise, the decision should be given effect, even the legislature has determined there is a managerial interest. Only when the public manager attempts to waive the independent interest of the public and bargains on an issue of significant public interest which outweighs any employee interest should the topic be determined non-permissive.

V. Additional Considerations

A. *Statutory Preemption*

1. *In General*

Regardless of how one balances the interest of the employees, public manager, and public, an additional consideration greatly affects the bargaining status of a given topic. This occurs when the bargaining topic, either mandatory or permissive, conflicts with a legislative standard established apart from the state public em-

ployee collective bargaining statute.[164] This potential conflict between the legislative bargaining obligation under the collective bargaining statute and other separate legislation is referred to as "statutory preemption."[165] Most often, public employee bargaining legislation authorizes collective barganing in an area where the legislature has by statute previously determined the point of accommodation on many potential collective bargaining subjects. The issue becomes how to accommodate the legislative bargaining mandate with existing legislative pronouncements.

This potential for conflict is significant when the legislature has enacted a considerable body of legislation regarding the rights and responsibilities of public employees and employers, as well as protective procedures for these legislative mandates, and has failed to reconcile these previous enactments with the newer collective bargaining legislation. Both the prior enactments and the collective bargaining legislation are designed to accomplish the same goal. However, the prior legislation created public employee-employer rights and duties through legislation, while the collective bargaining legislation envisions the establishment of rights and duties through the collective bargaining process. Some public employee collective bargaining acts have specifically spoken to this problem.[166] Without specific legislative direction, courts have been compelled to address this conflict on a case-by-case basis.[167] Montana's act does not address the problem; therefore, consideration of the topic is in order.

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164. The standard in conflict could be an administrative rule (either a prescriptive (legislative) rule, one issued pursuant to an express power to resolve doubtful cases under a general statutory standard or to render operative a statutory provision that is not self-executing, or an interpretive rule, one issued in the absence of a grant of authority to make law). *See* DAVIS, *supra* note 137, at § 5.06; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921, 958-60 (1965).

165. "[T]he obligation to bargain as to all terms and conditions of employment is a broad and unqualified one and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment." Bd. of Educ. v. Associated Teachers of Huntington, 35 N.Y.2d 122, 130, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23, (1972).

166. Of those states that have spoken on this problem, some have resolved the conflict by providing that the collectively bargained agreement shall prevail. *See, e.g.,* HAW. REV. STAT. § 89-19 (Supp. 1975); MASS. GEN. LAWS ANN. Ch. 150E, § 7(d) (West Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 5154C-1, § 20(b) (Vernon Supp. 1976). Other states allow the general statutory provision to prevail. *See, e.g.,* PA. CONS. STAT. ANN. § 1101, 703 (Purdon Supp. 1974); VT. STAT. ANN. tit. 21, § 1725(c) (Supp. 1977).

167. Even in those states where the legislature has indicated that the conflict is to be resolved favoring the collective bargaining agreement or the general statutory provision, courts have had difficulty and proceed on a case-by-case basis. *See* Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 270 (1975).

2. *In Montana*

Judicial resolution of this conflict which gives priority to pre-existing legislation significantly restricts the scope of collective bargaining. A determination that deems preempted every bargaining topic that involves a subject which the legislature has addressed exempts many potential bargaining subjects from consideration. On the other hand, a determination that gives priority to the bargaining obligation over conflicting legislation could potentially undermine a significant body of legislation designed to protect the public, the public employees, and the public employer.

Such a judicial resolution clearly is inappropriate. But where a bargaining topic "directly" conflicts with the statute, the topic is preempted from bargaining.[168] To determine whether there is a direct conflict, the PERB or court must closely evaluate the breadth of both the statutory provision and the bargaining topic (or contract provision). Only when the bargaining topic "directly" infringes upon the statute is the topic preempted.[169]

A good example of this conflict arises when teachers seek to include "the school calendar"[170] and "student discipline"[171] topics as part of their collective bargaining agreement. The Montana legislature has: (1) prescribed that any school district that does not provide at least 180 school days of instruction shall not be entitled to any apportionment of the state funds;[172] (2) prescribed the numbers of hours in every school day[173] (and the number of hours in a teacher

168. The public employer is precluded from agreeing to a specific proposal only when "other applicable statutory provisions explicitly and definitely prohibit the public employer [from doing so]." Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 270 (1975). *See also* Newman v. Bd. of Educ., 350 A.2d 339, 341 (Del. 1975).

The New York court has held that a public employer's duty to bargain over an otherwise mandatory subject is limited by plain and clear, as well as express, prohibitions in statutory or decisional law. Syracuse Teachers Ass'n v. Bd. of Educ., 35 N.Y.2d 743, 743, 361 N.Y.S.2d 912, 912, 320 N.E.2d 646, 646 (1974); Union Free School Dist. v. Nyquist, 38 N.Y.2d 137, 144, 341 N.E.2d 532, 535, 379 N.Y.S.2d 10, 15 (1975).

169. *See* note 168, *supra*.

170. Because the establishment of the school calendar determines the length of the work year and the amount and frequency of time off during the term, the subject affects employee hours, fringe benefits or other conditions of employment. For the various court treatments of this subject, exclusive of the statutory preemptive problem, *see* Annot., 84 A.L.R.3d 242, 306-09 (1978).

171. A Montana Education Association report finds that approximately one-third of Montana teachers responding to an MEA survey were victims of verbal abuse, physical assault, or suffered property damage in connection with their school assignments. MEA predicted strong discipline policies will become major issues in teacher contract negotiations this year. Missoulian, Sept. 14, 1978, at 14.

For judicial treatment of this topic, *see* City of Beloit v. Wis. Employment Rel. Comm'n, 73 Wis. 2d 43, 61, 242 N.W.2d 231, 239 (1976).

172. MCA § 20-1-301 (1978) (formerly codified at R.C.M. 1947, § 75-7402).

173. MCA § 20-1-302 (1978) (formerly codified at R.C.M. 1947, § 75-7403).

work day[174]); and (3) provided certain school holidays.[175] While bargaining topics cannot specifically deviate from a mandatory statutory provision or a prohibition, they could be considered during negotiations insofar as they don't "directly" conflict with these statutory provisions.[176] For example, the statute does not *mandate* 180 days of school; rather it *conditions payment* of the state's share of expenses on holding school for at least that number of days.[177] Therefore, negotiation on the number of days in the school year would not be preempted.[178]

Similarly, the specific statute for student discipline provides that a teacher or principal may hold a student accountable for disorderly conduct and, under specified circumstances and following certain procedures, may inflict corporal punishment and suspend the student. The statute also provides that a teacher or principal who shall abuse a student by administering any undue or severe punishment shall be guilty of a misdemeanor.[179] Thus, a bargaining topic which provides the circumstances under which a teacher may discipline students and the appropriate method of discipline would not be preempted by the statute as long as the provision did not directly conflict with the statute.[180] Additionally, a topic requiring the school board to pay the legal fees of a teacher who is subject to either civil or criminal litigation resulting from a disciplinary proceeding would not be preempted. The payment of legal fees for the teacher charged with violating a state statute does not directly conflict with the

174. MCA § 39-4-107 (1978) (formerly codified at R.C.M. 1947, § 41-1121 (Supp. 1977)).

175. MCA § 20-1-308 (1978) (formerly codified at R.C.M. 1947, § 75-7403.1(4) (Supp. 1977)).

176. As the Oregon court stated, "True the local board cannot agree to adopt rules, but we see no reason why this prevents it from bargaining as to the content of its rules so long as the rules eventually promulgated are consistent with statewide rules." Sutherlin Educ. Ass'n v. Sutherlin School Dist., 25 Or. App. 85, 548 P.2d 204, 205 (1976).

177. It has been recognized as a general method of statutory construction that when two provisions conflict, the provisions of a special act will prevail over the provisions of a general act. City of Billings v. Smith, 158 Mont. 197, 211, 490 P.2d 221, 230 (1971). Accordingly, when the provisions of the special act, (such as one dealing specifically with the authority of school districts) "directly" conflicts with the provisions of a collectively bargained agreement, authorized under the general collective bargaining legislation, the provisions of the special act have priority. *See* Pa. Labor Rel. Bd. v. State College Area School Dist., 461 Pa. 494, 337 A.2d 262, 269 (1975). *See also* Zderick v. Silver Bow County, 154 Mont. 118, 121, 460 P.2d 749, 751 (1969) in which it was held, before the passage of the collective bargaining act, that the county had no authority to enter into an agreement with employees granting accumulated sick leave pay upon retirement because retirement benefits were fixed by statute.

178. This of course does not mean that a topic not preempted is a mandatory or permissive subject of bargaining. The determination that a topic is not preempted by other legislation does not affect or give guidance to the determination of whether the topic is mandatory, non-mandatory and permissive, or non-mandatory and non-permissive. *See* section IV, *supra.*

179. MCA § 20-4-302 (1978) (formerly codified at R.C.M. 1947, § 75-6109).

180. However, the imposition of punishment must comply with the requirements of due process. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975).

intent of the statute. A provision of the payment of legal fees is merely an indirect form of employee compensation, similar to health insurance. It does not adversely affect the public's right to enforcement of state criminal laws. Unless some other statute, rule, regulation, or public policy can be found that "directly" prohibits the payment of legal fees of public employees, the contract provision should not be preempted.

B. *Arbitration*

Arbitration has been particularly difficult for PERBs and courts. One problem comes from the argument that collectively bargained arbitration clauses which authorize a third party arbitrator to make a decision in an area which the legislature has authorized the public employer to determine is an unlawful delegation of governmental authority.

There are two types of arbitration provisions: "grievance arbitration" and "interest arbitation."[181] Most collective bargaining agreements have a grievance procedure providing the method for resolving contract disputes. An employee may raise an issue regarding the proper interpretation of the collective bargaining agreement and the issue will be resolved under the contractual grievance procedure. Often the grievance procedure will provide a multi-step resolution process. The initial steps often involve a series of appeals to management officials, and, frequently, the final step involves the submission of any resolved grievance to arbitration.[182]

Interest arbitration arises when the parties agree to submit to arbitration either an existing or future dispute regarding the provisions to be included in a collective bargaining agreement. The arbitrator is called upon to decide the controversy by including or excluding the disputed contract provision or molding an appropriate provision. The arbitrator in effect settles the dispute by writing the disputed portion of the contract.[183] Because the courts treat grievance arbitration differently than interest arbitration, the subjects will be discussed separately.[184]

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181. *See generally* SMITH, MERRIFIELD, AND ST. ANTOINE, LABOR RELATIONS LAW: CASES AND MATERIALS 761-69 (5th ed. 1974), *citing* Labor Study Group, *The Public Interest in National Labor Policy* 32 (Committee for Economic Development 1961).

182. *Id.*

183. *Id.*

184. Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 624, 526 P.2d 971, 981, 116 Cal. Rptr. 507, 517 (1974); West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 576, 295 A.2d 526, 532 (1972); Local 1226, Rhinelander City Employees v. City of Rhinelander, 35 Wis. 2d 209, 220, 151 N.W.2d 30, 36 (1967).

1. *Grievance Arbitration*

Absent a legislative prohibition, grievance arbitration represents an unlawful delegation of authority only when the grievance or contract issue to be resolved involves an issue which would not be subject to collective bargaining because of its non-mandatory and non-permissive status.[185] Those subjects excluded from collective bargaining because they can only be considered in a multilateral forum, or are preempted by other legislation, are certainly not appropriate for resolution by an arbitrator. If the subject of the grievance is exempt from collective bargaining, it certainly cannot be decided unilaterally by an arbitrator. It is inconsistent to prohibit a subject from bilateral bargaining because the subject is legislatively preempted or because multilateral consideration is required, and then allow the same subject to be decided by an arbitrator if it arises as a grievance. If the public interest in a policy subject is so significant that the bilateral collective bargaining process is an inappropriate forum for consideration of the subject, or the legislature has preempted the subject from collective bargaining consideration, consideration by an arbitrator would certainly be inappropriate. However, if the grievance involves a subject that would be classified as either mandatory or permissive during collective bargaining, and the public employer could bargain on the subject, the public employer could agree to have the subject submitted to arbitration if it arose as a grievance.

2. *Interest Arbitration*

Unlike grievance arbitration, in the absence of authorizing legislation, most courts have held that interest arbitration constitutes an unlawful delegation.[186] According to the courts' rationale, while

185. "To be arbitrable, a matter must qualify as one on which the parties may negotiate. A matter which is not legally negotiable in the first place cannot be arbitrable." Ridgefield Park Educ. Ass'n v. Bd. of Educ., ___ N.J. ___, ___, 393 A.2d 278, 286 (1978). "Obviously, the [school] board cannot delegate to an arbitrator its statutory authority as to matters of policy nor can it agree to binding arbitration of matters concerning which a statutory duty rests on the board alone. If the board sees fit to agree to binding arbitration it obviously must confine the subjects involved to those matters which are not ultra vires. Within these limitations binding arbitration of grievances within the terms and conditions of an existing group teacher contract is a permissive method for settling disputes and is a mandatory subject of negotiation between the parties." West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 588-89, 295 A.2d 526, 538 (1972). *See also* Sackman, *supra* note 13, at 167.

186. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 589, 295 A.2d 526, 537 (1972); Local 1226, Rhinelander City Employees v. City of Rhinelander, 35 Wis. 2d 209, 220, 151 N.W.2d 30, 36 (1967), *citing* City of Biddeford v. Biddeford Teachers Ass'n, 304 A.2d 387 (Me. 1973). *Contra,* Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 624, 116 Cal. Rptr. 507, 517, 526 P.2d 971, 981 (1974).

the legislature has directed the public employer to bargain with the employee representative, it has also provided that neither party is required to agree on any specific provisions. Notwithstanding the legislative policy favoring collective bargaining to agreement, the legislature has directed the "parties" to reach that accord. The public employer cannot "abdicate its responsibility for making a contract" to a third party arbitrator.[187] The public employer's abdication of its responsibility for making a contract to an arbitrator is treated as an unlawful delegation of authority.

In Montana, the legislature has specifically provided for interest arbitration in public employment collective bargaining.[188] Despite the fact that the Montana provision may be subject to constitutional attack,[189] the relevant issue here is whether the parties may agree to submit every potential contract subject to an arbitrator. The statute provides that the parties may voluntarily agree "to submit *any or all* of the issues to final and binding arbitration . . . ."[190] Clearly, "any or all" refers to only those issues on which the public employer is authorized to negotiate. Thus, as was the situation with grievance arbitration, the public employer is precluded from submitting non-mandatory and non-permissive issues for interest arbitration. It would be unreasonable and inconsistent to allow a public employer, who is precluded from negotiating an issue because a multilateral decision-making process is required or because the issue has been legislatively preempted, to agree to submit the same issue to a third party for determination.

Thus, while agreements authorizing arbitration are valid in Montana, they cannot be used to raise or resolve subjects which are beyond the scope of collective bargaining negotiations. An arbitration provision cannot authorize the determination of issues by a third-party arbitrator which cannot be raised and determined by the parties themselves.

VI. CONCLUSION

Given the almost infinite variety of bargaining proposals, it is

187. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 589, 295 A.2d 526, 538 (1972).

188. MCA § 39-31-310 (1978) (formerly codifed at R.C.M. 1947, § 59-1614(9) (Supp. 1977)).

189. Interest arbitration provisions have been subject to constitutional attack, in some instances successfully. For a review of the constitutional arguments used and the judicial outcome *see* Weisberger, *Constitutionality of Compulsory Public Sector Interest Arbitration Legislation: A 1976 Perspective,* LABOR RELATIONS LAW IN THE PUBLIC SECTOR 35 (ABA Section of Labor Relations Law 1977).

190. MCA § 39-31-310 (1978) (formerly codified at R.C.M. 1947, § 59-1614(9) (Supp. 1977)) (emphasis added).

impossible in an abstract to state the parameters of public sector collective bargaining. For this reason, PERBs and courts have approached this growing area of litigation on a case-by-case basis. Only when presented with specific topics can an accurate determination be made. When properly understood and applied, the balancing formula provides a fair and accurate method to determine the appropriate scope of public sector collective bargaining. This is true, however, only when the decision maker understands and appreciates the role collective bargaining plays in public sector decision making and the legitimate, yet often competing, interests of public employees, employers, and the public. Balancing assumes the decision maker understands and appreciates the competing interests involved and the framework in which the decision must operate.

The charge to which the balancing formula is most susceptible is not the lack of use, but rather its misuse. All too often, PERBs and courts balance with little regard for how the decision will affect public sector decision making and without properly identifying the competing interest involved. In such instances balancing becomes a thinly veiled method to reach a preconceived decision or adopt a decision reached in another forum which may have little or no relevance. Decision makers need not alone shoulder the blame for this misuse of balancing. All too often the "record" in such a case reveals that counsel failed to bring to the attention of the decision maker the appropriate interests and indicates the extent, if any, that a favorable decision would affect public sector decision making. The failure of counsel to "make a record" has caused decision makers to balance poorly defined interests, the result of which is often conclusional decision making.

A goal of this article has been to address the impact collective bargaining has on public sector decision making and to identify the often-competing interests employees, employers, and the public may have regarding a particular bargaining topic, as well as to indicate how these interests change from topic to topic. To the extent appropriate interests are identified in relation to a given topic, the balancing formula will result in fair and accurate decisions. The author hopes the preceding discussion will aid in this regard.